FILED
JUL 29 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 273

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *HAWAIIAN*,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND APPENDIX TO PETITION.

CLEMENT C. HOUGHTON,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

KIRLIN, CAMPBELL & KEATING,
Attorneys for Petitioner.

Parmelee Printing Co., 27 Thomas St., New York 13, N. Y. WO 4-4

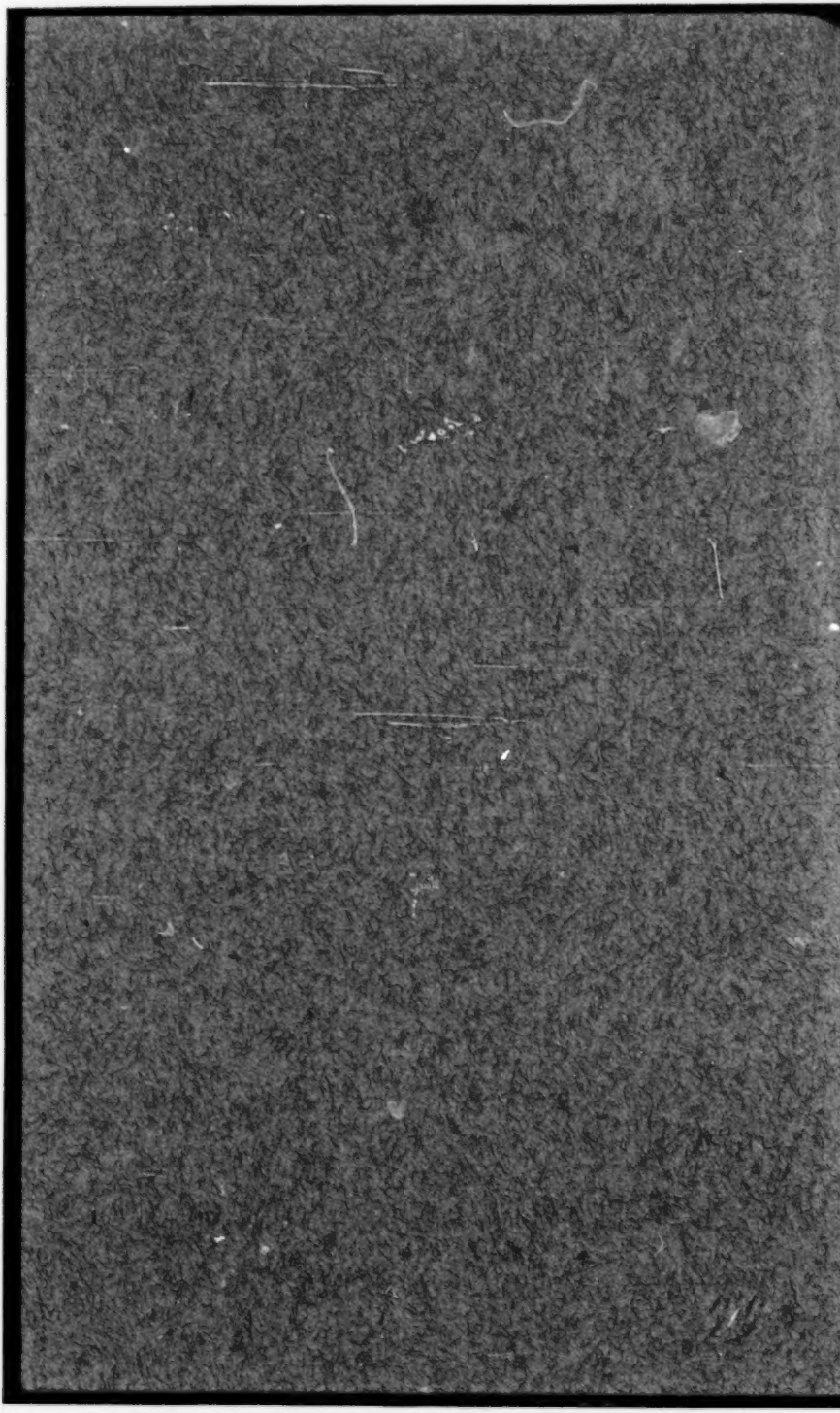

TABLE OF CONTENTS.

	PAGE
OPINION BELOW	2
GROUNDS OF JURISDICTION	2
QUESTIONS PRESENTED	2
THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT AND SUPPORTING ARGUMENT	16
On First Question Presented	18
On Second Question Presented	25
On Third Question Presented	28
CONCLUSION	35
APPENDIX	39
PART I: Commissioner's Report, Opinion, Findings, Judgment and other proceedings in the United States Court of Claims	39
PART II: Text of Statutes Involved	119
PART III: Evidence Relating to the Admitted Purpose and Actions of the United States Maritime Commission and the War Shipping Administration to Compel an Arbitrary and Drastic Reduction of Shipping Rates Prior to Requisitioning so as to Enable Vessels to be Requisitioned at Such Arbitrarily Reduced Rates	125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *Hawaiian*,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The petitioner, American-Hawaiian Steamship Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in a suit by plaintiff (Docket No. 48758) to recover just compensation for the requisitioned use of petitioner's steamship *Hawaiian*. (App.* 117).

* The references to "App." in this petition are to the pages in the "Appendix" to this petition which contains copies of the commissioner's report, findings of fact, conclusion of law, opinion and judgment of the Court of Claims. In accordance with Rule 21(1) of this Court, the original record on file in the Clerk's office of the Court of Claims has been certified and transmitted to this Court as provided by Rule 57(d) of that Court. The Appendix also contains certain portions of the evidence of record which are referred to in this petition.

OPINION BELOW.

The judgment of the Court of Claims was rendered on the basis of an opinion, findings of fact and conclusion of law announced by the Court on October 5, 1954. The opinion, findings and conclusion are printed in the "Appendix" to this petition at pages 79-117 and are officially reported at 129 C. Cls. 365. The opinion is unofficially reported at 124 F. Supp. 378 and 1954 A. M. C. 2214.

GROUNDS OF JURISDICTION.

The judgment sought to be reviewed was dated and entered on March 16, 1955 (App. 117-8). A motion for rehearing was filed by defendant on March 25, 1955 and was denied by the Court of Claims on May 3, 1955 (App. 118).

Jurisdiction of this Court to review judgments of the Court of Claims by writ of certiorari is provided by Section 1255 of Title 28, U. S. Code.

QUESTIONS PRESENTED.

1. This case presents the important constitutional question specifically reserved by this Court in *United States* v. *Felin & Co.*, 334 U. S. 624 at 646, whether, consistently with the Fifth Amendment to the Constitution, just compensation for the taking of private property for public use (such property being in this case the petitioner's freight steamer *Hawaiian*), may be limited by schedules of prices (in this case such schedules being maximum time charter rates for the use of vessels), which requisitioning

agencies of the government (in this case the United States Maritime Commission and its successor agency, the War Shipping Administration) fixed at levels about 50% below fair market prices which had been approved by those agencies immediately before promulgation of the first schedules, *notwithstanding the fact that such schedules were issued for the predominant purpose of later acquiring the use of the property affected by such price-fixing?*

2. A further important constitutional question presented is whether, if a rate for the use of a ship has been fixed by a government agency under conditions described in the first question and has been accepted by the shipowner, under conditions of compulsion, as compensation for the use of the ship on "time charter basis" under a requisition which has terminated, such acceptance gives such rate any lawful effect as a limitation upon or as a measure of just compensation for a subsequent requisition of the use of the ship upon a "bareboat basis"*?

3. Further novel and important questions of constitutional and administrative law are raised by the holding of the Court of Claims that the ship charter rate "restrictions" imposed by the ship requisitioning agencies in administering the so-called "Ship Warrants Act" (Act of July 14, 1941; 55 Stat. 591; 50 War App. U. S. C. Secs.

---

* Requisition on "bareboat basis" means that the government took over the entire possession and operation of the vessel. (See Finding 9, App. 92.) This contrasts with the prior requisition on "time charter basis" under which the shipowner retained possession and operation of the vessel and paid for crew, supplies, repairs and insurance (except war risk insurance). (See also Finding 9, cited above.)

1281-6) reduced the value of the use of the *Hawaiian* for purposes of just compensation considerably below the levels to which petitioner would otherwise have been entitled. The questions presented include the following:

a. As the schedules of maximum rates of charter hire promulgated by those agencies in administering the Act were admittedly far below current fair and reasonable market rates, did the Act nevertheless authorize those agencies to impose such schedules as lawful conditions required to be observed by ship operators in order to obtain and keep licenses (warrants) to procure goods and services essential to the operation of their ships?

b. Whether a statute entitling an administrative agency to attach conditions to the issuance of licenses needed for the procurement of goods and services essential to the operation of vessels or other private property affected, entitles such agency to dispense with the requirements of due process of law and of just compensation established by the Fifth Amendment to the Constitution and to issue such licenses only on condition that the licensees undertake to operate their property for such purposes and at such prices as the administrative agency may determine.

c. Even if it be assumed that such agency price schedules could be legally binding on such property-owners as may have given undertakings to observe them as a condition of obtaining licenses, can such schedules lawfully be considered a part of the surrounding circumstances to be given effect in determining just compensation for the use of requisitioned property belonging to the petitioner which never did give such an undertaking?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The case involves: the Fifth Amendment to the Constitution of the United States; the requisition section (Sec. 902) of the Merchant Marine Act, 1936, as amended (49 Stat. 2015, 53 Stat. 1254; 46 U. S. C. Sec. 1242) and the so-called Ship Warrants Act (Act of July 14, 1941, P. L. 173, 77th Congress, 55 Stat. 591; 50 War App. U. S. C. Secs. 1281-1286).

The verbatim text of such portions of the Fifth Amendment to the Constitution as are specifically involved, is as follows:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The verbatim text of the two statutes involved is set forth in Part II of the Appendix to this brief. (Pp. 119-124)

STATEMENT OF THE CASE.

This is a suit to recover just compensation for respondent's use of petitioner's American freight steamer *Hawaiian* (a vessel of 9640 tons deadweight capacity), from July 7, 1943 to May 1, 1946 while under requisition on bareboat basis* by the War Shipping Administration pur-

* On May 25, 1942, the *Hawaiian* had been requisitioned on "time charter basis" and petitioner subsequently executed a requisition time charter party (Def's. Ex. 2) which was terminated, however, when the requisition on "bareboat basis" occurred. The meaning of "time charter basis" and of "bareboat basis" is defined in the footnote on p. 3, *supra*.

suant to Section 902 of the Merchant Marine Act, 1936, as amended. (Finding 1; App. 87) Jurisdiction of the Court of Claims over such suits is specifically provided by Section 902(d) of that Act. (App. 119-121)

The War Shipping Administration offered and petitioner declined compensation at the rate of $1.28 per deadweight ton per month, representing a basic rate of $1.25 and an additional 3¢ allowance for the vessel's speed which exceeded twelve knots. (Findings 2 and 4; App. 87, 89) As provided by Section 902(c) of the above Act, petitioner was paid 75% of the offer. (Finding 3; App. 88)

The rate offered to petitioner was prescribed by General Order No. 37, issued April 7, 1944, by the War Shipping Administration to fix schedules of compensation under a revised requisition program adopted in 1943, after a dispute between the Comptroller General of the United States and the Administrator. (Findings 27 and 28; App. 108-111) As will appear later, there had been three previous rate schedules of the War Shipping Administration or its predecessor, the United States Maritime Commission.

Petitioner's Case Below.

Evidence of the actual fair market value of the *Hawaiian's* use during the requisition period was unavailable because no free market existed in the United States at the time. The use of all large, ocean-going freighters, such as the *Hawaiian,* had been requisitioned by the War Shipping Administration in 1942. Unless lost or requisitioned for title meanwhile, such vessels continued in the service of the government, under one form of requisition of use or another, until returned to their owners in 1946. (Finding 6; App. 90)

In the absence of an actual contemporaneous market, petitioner proved the probable fair market value of the use of the *Hawaiian* under the requisition by establishing that:

a. The actual fair market value of the use of the *Hawaiian* and of similar large American freighters engaged in foreign commercial trade* (shown by accounts covering many hundreds of voyages) was from $5.00 to $6.00 per deadweight ton per month before government intervention in the shipping market occurred in 1941 and until requisition occurred in 1942; (Findings 8, 11-16, App. 91, 94-98; Commissioner's Findings 7, 8, 11-17, App. 43-45, 47-54; Pl. Exs. 27, 29, 30, 38, 39, 40, 48, 48a, 64; Def's Ex. 17).

b. Throughout the requisition period, continuance of favorable economic conditions would have caused the *Hawaiian's* earning power and use value to remain at a level *at least* as high as it had been in 1941; (Findings 7, 8, 17, App. 90-2, 99; Commissioner's Findings 8, 18, App. 44-5, 54-5).

c. Earnings at such level were actually realized by the War Shipping Administration itself from employment of part of its requisitioned fleet in commercial operations in 1943 and 1944; (Commissioner's Finding 19, App. 55-6; Pl. Ex. 31) and

d. A comparable level of earnings was realized by petitioner in post-requisition berth operations in 1946. (Commissioner's Finding 20, App. 56; Pl. Ex. 33)

---

* Petitioner's fleet was then mostly in foreign trade (Finding No. 10). As that was the "highest and most profitable use", just compensation would be measured by the value of vessels employed in that trade. *Boom Company* v. *Patterson*, 98 U. S. 403; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Toronto, etc. Nav. Co.*, 1949, 338 U. S. 396, 405.

The actual causes of the pre-requisition levels of American freighter earnings of $5.00 to $6.00 per deadweight ton per month were the increased volume and higher class of traffic carried to and from non-combat areas as a result of shrinkage of competition from foreign freighters because of war conditions in Europe and as a result of improved business conditions in the United States. (Findings Nos. 7-8, App. 90-2) There was no evidence that ocean conference tariff rates charged to shippers were excessive. (Finding No. 7, App. 91)

The evidence on which plaintiff's case was founded was summarized in the following finding of the Commissioner; (App. 56-7), (italics ours):

> "21. *The fair and reasonable market value of the use of the steamer Hawaiian on bareboat basis throughout the period of defendant's requisition of her use on such basis* from July 7, 1943, to May 1, 1946, *was from $5.00 to $6.00 per deadweight ton per month.* (See Findings Nos. 11-20.) *That value* was being realized by the plaintiff immediately prior to the vessel's entry on Government service in January 1942 and *could reasonably have been realized by the plaintiff if the vessel had not been taken by defendant,* but had remained in plaintiff's possession and control.
>
> "22. *The above findings set out facts which are not materially controverted* and which are the basis of plaintiff's theory of the case. In short, it is plaintiff's theory that at the time of the requisition there was no free market and, therefore, the Court should consult the nearest free markets in point of time, in view of proof that the factors influencing such free market, that is supply and demand, prevailed throughout the period of requisition and

would have been effective had the market remained free."

Respondent's Case Below.

Summarizing the facts and contentions of respondent's case, the Commissioner found, (App. 57-8) (italics ours):

"23. The defendant's theory of the case is likewise based on facts that are largely uncontroverted. *It is a fact that after the Ship Warrants Act became effective the Maritime Commission and the War Shipping Board, by coercive measures* pursuant to such Act, by collaboration with the British and with insurance underwriters, *made it progressively impossible for American Shippers to operate without acceptance of the Government's schedule of rates,* with the consequence that such rates came to be accepted by a substantial majority of such shippers. Having arrived at this situation, the defendant says its rates were the market or prevailing rates.

"*The defendant makes no contention that such rates bore any relation to the rates existing in the nearest free market or that such free market rates would not have remained at least as high had the market remained free. In fact, the record is replete with claims by the defendant that it destroyed the free market and effected a substantial roll back of rates.* * * *

"24. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair

market rates. *They were rates promulgated in furtherance of an admitted purpose of those agencies to acquire for defendant, by coercion and other means, the use of privately owned American merchant vessels at rates of hire fixed by those agencies at levels representing drastic reductions in current market rates of charter hire, instead of being fixed at levels commensurate with the earning power which those vessels then had and continued to have for commercial purposes.* The facts concerning the administrative acts of the Commission and the War Shipping Administration are set forth more fully in Findings Nos. 25 through 35."

Respondent took no exception to the foregoing findings other than an objection to the word "coercive" in Finding 23 and to the word "coercion" in Finding No. 24.

The Opinion Below.

The Court of Claims agreed with the Commissioner that "**economic conditions of demand for and supply of shipping space,** which had materially contributed to or brought about the level of earnings realized by shipowners in 1941 from the commercial employment of large, American-flag freighters such as the *Hawaiian,* **throughout the bareboat requisition period remained favorable to a continuance of the potential level of earnings of such freighters from commercial employment at or above 1941 levels.**" (Finding No. 17, App. 99, emphasis ours.)

Notwithstanding that finding, however, the Court held that it would be "unrealistic" to disregard the "**lawful legislative and administrative restrictions on the use of**

the property valued'' and other assumed ''war conditions''* which, in the Court's opinion, made ''what the boat earned before the war • • • no measure of what she could have earned during the war.'' (Opinion, App. 83.)

Although the Court did not attempt to specify quantitatively the reduction of ship earnings which it attributed to ''legislative and administrative restrictions'' as distinguished from the supposed effect of ''war conditions'', the great weight given to the ''restrictions'' is obvious by the Court's statement that ''except for the restrictions'' petitioner could ''no doubt'' have earned amounts ''considerly in excess'' of the amount allowed by the Court (App. 85-6).

After thus rejecting petitioner's contentions, the Court held respondent's position also to be ''untenable''. The War Shipping Administration's bareboat requisition rates of $1.25 per deadweight ton per month, plus an allowance for speed, were found to be unjustly low for the *Hawaiian*, as compared with the pre-requisition earnings which petitioner had realized. (Opinion, App. 84-5.)

Then, after stating that the Court was ''taking everything into consideration'', including ''earnings before requisition on a time charter basis and **afterwards**, • • •

---

* Petitioner denies that any ''war conditions'' other than the so-called ''legislative and administrative restrictions'' would have decreased the *Hawaiian's* earning power during the requisition period and considers the Court's finding to be contrary to the evidence. No such finding appeared in the Commissioner's Report. If certiorari is granted, petitioner will urge that the Court erred in making such a finding. However, the questions presented by this petition arise from the Court's finding that the major cause of decrease would have been ''legislative and administrative restrictions.''

legislative and administrative restrictions and the uncertainties of the war, [the Court] * * * concluded that $2.50 per deadweight ton per month is 'just' both to the owner and the Government." (Opinion, App. 86)

The Court's award of $2.50 per deadweight ton per month approximated the figure of $2.46 which the Court had found, just previously in the opinion, to be the difference between: (a) petitioner's costs of $1.89 per deadweight ton per month incurred in operating vessels on a time charter basis; and (b) the requisition rate of time charter hire of $4.35 per deadweight ton per month allowed by the War Shipping Administration for the *Hawaiian* while she was under requisition on "time charter basis" preceding the requisition on "bareboat basis".

Therefore, the compensation of $2.50 per deadweight ton per month allowed by the Court in effect adopted the earnings available under the requisition time charter rates as measuring just compensation during the bareboat requisition period of the *Hawaiian*.

Those requisition time charter rates, however, were admittedly fixed by the War Shipping Administration at arbitrary levels in furtherance of a program to "roll-back" shipping rates so as to requisition vessels at levels far below probable fair market rates. (See evidence quoted in Part III of the Appendix, pp. 125-134).

The injustice of that requisition time charter level of rates moreover appears from the opinion itself because, as the Court found, those rates were the result of the War Shipping Administration having "beat the owners down as much as they could" and having threatened requisition of title to the vessels (App. 85).

The Nature and Purpose of the "Legislative and Administrative Restrictions" on which the Opinion Below Depends.

The extent, purpose and confiscatory nature of the reduced charter rate levels imposed by the "legislative and administrative restrictions" and carried over into the requisition rate schedules of the War Shipping Administration are indicated in Findings 25-35 of the Commissioner (App. 58-78) and in Findings 18-30 of the Court. (App. 100-116)

Among the important facts about the "legislative and administrative restrictions" were the following:

Until after the Ship Warrants Act became effective, the market time charter rates approved by the United States Maritime Commission were $7.50 per deadweight ton per month for large freighters and would produce "bareboat" earnings of about $5.61 per deadweight ton per month (Finding No. 16, App. 98-9). (*Rank*, tr. 733; *Houlihan*, tr. 861-3; Def. Ex. 4 at p. 170; Pl. Ex. 41 at p. 2).

The Ship Warrants Act became law on July 14, 1941. In substance, the Act (App., pp. 121-4) authorized a licensing system to be administered to effectuate the policy prescribed in Sec. 4 of the Act, which was "to make fair and reasonable provision for priorities" with respect to the transportation of strategic and other defense materials. Its terms are more fully discussed at pp. 30-32 below.

The Maritime Commission used the Act, however, as a basis for issuing two "drastically" reduced rate schedules which the Commission attempted to impose on shipping generally.

On July 30, 1941, the Maritime Commission published its first schedule of maximum time charter rates effective August 1, 1941, and soon thereafter adopted such schedule as a condition to be observed in order to obtain and hold "ship warrants" (Findings 21 (a) and (b), App. 102). The rate prescribed for a vessel of the *Hawaiian's* size was $4.60 per deadweight ton per month.

A Commission official admitted that the schedule **"represented an arbitrary reduction of $3.00 per ton under what had been more or less considered a going rate prior to that time"** (Def's. Ex. 4 at p. 171; Pl. Ex. 41 at p. 2).

On January 5, 1942, the Commission issued a second schedule of maximum time charter rates to be observed by warrant-holders beginning January 20, 1942. The new schedule reduced the levels of the previous schedule by about 28% (Finding 21 (c)). The maximum rate for a vessel like the *Hawaiian* was $3.35 per deadweight ton per month (App. 102-3).

To enforce the schedules*, measures wholly unauthorized by the Ship Warrants Act were adopted. Beginning in February, 1942, marine underwriters were induced to refuse insurance to vessels not having warrants (Finding 21(e), App. 103). By regulation, in February 1943, shore facilities were *forbidden* to furnish services or supplies to vessels not holding warrants (Finding 21(f); App. 103).

On May 14, 1942, a schedule of requisition rates on time charter basis was issued by the War Shipping Administration by its General Order No. 8 (Finding 23).

---

* As warrants were unnecessary for vessels under requisition or charter to the government, American shipowners were not in fact affected by the warrants system after general requisition occurred in 1942.

Although, as we showed above at p. 12, the Court of Claims seems to have measured just compensation for the *Hawaiian* by the earnings available under this schedule of requisition time charter rates, the arbitrary and confiscatory nature of the schedule is manifest in the Court's own findings. (Findings 24-25, App. 104-7). The admitted purpose of the schedule was to fix rates which would only be sufficient to cover the shipowner's operating expense and a "bareboat factor", concerning which the Court of Claims found (App. 105, emphasis ours):

> "21 (a) **The 'bareboat' factor** of $1.00 per deadweight ton per month **was not based upon any approximation of the earnings realized by shipowners from commercial employment** of their vessels as shown by the voyage reports above mentioned, indicating such earnings from voyages terminating in the last quarter of 1941 or early 1942. The requisition time charter rates as contained in General Order No. 8 **had no relation to the 1941 commercial earnings or the 1941 value of the use of requisitioned vessels.** The former Director of Fiscal Affairs of the War Shipping Administration testified at a hearing in this case that 'we got together a lot of information and **we thought that the best way to fix the rate was to fix it on as low a basis as we possibly could.** * * * We know that in 1941 the ships were earning quite a lot of money, and that **the rates** that were published in General Order No. 8 **were nowhere near as high as the earnings the companies were making in 1941.**'"

Petitioner eventually accepted the requisition time charter rate for the *Hawaiian* while under requisition on that basis but under the compulsion described in the Commissioner's Finding 30 and the Court's Finding 26.

Characterizing the charter rate schedules under the Warrants Act and the requisition programs as a whole,

the Court made the following finding (App. 100-1, emphasis ours):

> "19. **The charter rates promulgated** from time to time **by the United States Maritime Commission and the War Shipping Administration** in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs **were not market rates nor equivalent to probable fair market rates.**"

Probably the most important fact about the various schedules was that the predominant purpose of the requisitioning agencies in issuing them was to effect "a downward revision of the whole structure of rates and values before resorting to requisition" (Def's. Ex. 4 at p. 11). That purpose was frankly and repeatedly admitted by Admiral Emory S. Land, who was both Chairman of the United States Maritime Commission and Administrator, War Shipping Administration and others. Many of their statements are quoted from the record in Part III of the Appendix, pp. 125-134. See also Def's. Ex. 4 at pp. 11, 192, 214; Def's. Ex. 14 at p. 22; Pl. Ex. 75 at p. 464; Pl. Ex. 28 at p. 8.

REASONS FOR GRANTING THE WRIT AND SUPPORTING ARGUMENT.

In at least three respects, the decision of the Court of Claims is irreconcilable with fundamental principles embodied in the Fifth Amendment to the Constitution of the United States and presents questions of outstanding general importance which have not been but should be specifically decided by this Court.

Petition.

(1) The Fifth Amendment requires that compensation for private property taken for public use shall be measured by the standard of actual or probable fair market value when it is possible to do so but the decision below would sanction partial confiscation of that value by substituting a lower standard which would give effect to compulsory government price schedules intentionally fixed below fair market prices for the purpose of acquiring the affected property at lesser price levels.

(2) The concept of fairness underlying the Fifth Amendment's requirement of just compensation is necessarily inconsistent with the implied holding of the Court of Claims that by accepting "under some compulsion" a price which the requisitioning agency had admittedly fixed below the fair market price and had offered as compensation for one taking of its vessel, the petitioner was thereby bound, upon a subsequent taking, to accept a lower standard of compensation which would give effect to such government-fixed rates rather than to the standard of probable fair market value.

(3) The Fifth Amendment's provision that no person shall be deprived of property without due process of law and its requirement of just compensation cannot lawfully be circumvented by a licensing device such as the Ship Warrants Act and the court below was manifestly in error, therefore, in holding that arbitrary and confiscatory price schedules which the requisitioning agencies imposed as a condition of issuing ship warrants (licenses), constituted a valid limitation upon the standard of just compensation to which the petitioner was entitled.

The foregoing points will be amplified briefly below.

I.

It is, of course, elementary that if an actual fair market for similar vessels had existed in the United States at the time when the *Hawaiian* was requisitioned, petitioner would be entitled to the fair market value of the use of the vessel as established by actual market transactions. *Boom Co.* v. *Patterson,* 98 U. S. 403, 407; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 80, 81; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *Vogelstein* v. *United States,* 262 U. S. 337; *United States* v. *New River Collieries,* 262 U. S. 341; *Olson* v. *United States,* 292 U. S. 246, 255; *United States* v. *Miller,* 317 U. S. 369, 374; *Kimball Laundry Co.* v. *United States,* 1948, 338 U. S. 1; *United States* v. *Petty Motor Co.,* 1946, 327 U. S. 372; *United States* v. *General Motors Corp.,* 1945, 323 U. S. 373.

The reasons which caused adoption of the fair market value standard of just compensation apply with equal force in situations where actual current market transactions may be lacking at the time of the taking. The value to be ascertained under such conditions is the probable fair market value. *Brooks-Scanlon Corp.* v. *United States,* 1924, 265 U. S. 106, 124; *Standard Oil Co.* v. *Southern Pacific Co.,* 1925, 268 U. S. 146, 155. *United States* v. *Toronto etc. Nav. Co.,* 338 U. S. 396.

Rule 3 of the Rules of the Advisory Board on Just Compensation* defines probable fair market value as "the

* Full reference to the Report of the Advisory Board appears in the footnote on p. 27.

price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." (Pl. Ex. 51, at p. 32.)

Only the standard of fair market value fulfills the test of being just to the property owner and to the government. Any compensation less than fair market value would fall short of the requirement that the compensation shall be "the full and perfect equivalent in money of the property taken" (*United States* v. *Miller,* 317 U. S. 369, 373), because it would obviously constitute a partial confiscation. Confiscation is repugnant to the Fifth Amendment to the Constitution and to simple justice, whether the confiscation be total or partial. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

On the other hand, the standard of fair market value is just to the government because it limits compensation to the amount which the property owner could obtain for use of his property in a fair market but excludes any enhancement of price caused by the government's need for the property and its consequent activities in the market. *United States* v. *Cors,* 337 U. S. 325. There was no such enhancement of American shipping rates in 1941. *Smith-Douglass Co.* v. *United States,* 126 C. Cls. 758, 767.

Although the Court of Claims purported to acknowledge the foregoing principles, (App. 81-2), and although it expressly found that economic conditions throughout the *Hawaiian's* requisition period "remained favorable to a continuance of the [pre-requisition] level of earnings," (Finding 17, App. 99), nevertheless, as we have shown, the Court awarded compensation at $2.50 per deadweight ton per month, a figure far below such levels. This was done mainly on the ground that the *Hawaiian's* earning power,

if she had been free of requisition, would have been lower than the pre-requisition levels because of "legislative and administrative restrictions".

We have also shown that such "legislative and administrative restrictions" consisted entirely of rate schedules imposed by the requisitioning agencies in an effort to get the use of privately-owned ships for a compensation of about $1.25 per deadweight ton per month instead of $5.00 to $6.00 which their owners were realizing at rates approved by those agencies immediately before the schedules were imposed.

Thus, the major issue squarely presented to the Court below and to this Court is whether the Fifth Amendment permits compulsory price-fixing to be employed by a requisitioning agency for the purpose of reducing the compensation payable for private property taken or about to be taken, to levels far below the probable fair market value of the property.

Instead of facing that issue, however, the Court's discussion merely concluded by begging the question with the statement that "lawful legislative and administrative restrictions on the use of the property valued" must be considered as facts relevant to "any just and equitable valuation".

In thus deciding by necessary implication that the "legislative and administrative restrictions" were lawful and relevant, the Court of Claims possibly thought its conclusion was supported by *United States* v. *Commodities Trading Corp.*, 1950, 339 U. S. 121, which had previously been cited on a different point. Some of the expressions in the opinion of the Court of Claims resemble expressions appearing in the majority opinion in the *Commodities* case. In

fact, however, the *Commodities* decision affords no such support, as we show below.

The *Commodities* case and its predecessor decision, *United States* v. *John J. Felin & Co.*, 1948, 334 U. S. 624, both involve the relationship between just compensation and wartime price-fixing by the O. P. A. under the Emergency Price Control Act of 1942. (56 Stat. 23; 50 War Appendix, U. S. C., Secs. 901-926). That Act and the price schedules issued by the O. P. A. thereunder bore no resemblance in constitutionality, terms, scope and purpose of application either to the Ship Warrants Act, or to the requisitioning section of the Merchant Marine Act or to the "restrictions" on rates imposed by the requisitioning agencies in administering the latter Acts. For those and other reasons shown below, the *Felin* and *Commodities* decisions were not only inapplicable but *the Felin case expressly reserves decision on the principal question presented in the instant case.*

United States v. *John J. Felin & Co.*, 334 U. S. 624, involved just compensation for "pork cuts" requisitioned from a meat packer in March, 1943. The plaintiff was tendered and refused compensation at the O. P. A. ceiling price which had originally been fixed in March, 1942, at the market level prevailing then. The plaintiff sought and the Court of Claims allowed "replacement cost" which was claimed to exceed the ceiling price because of a subsequent rise in the market price of live hogs. Nevertheless the plaintiff and others had sold pork cuts to their customers at the O. P. A. ceiling price both before and after the requisition.

This Court reversed by 7 to 2 and directed judgment for the O. P. A. ceiling price but the reversal was based on three separate opinions differing widely in their grounds.

Mr. Justice Reed, with whom Mr. Justice Black and Mr. Justice Murphy concurred, adopted the view that (p. 643) "whenever perishable property is taken for public use under controlled-market conditions, the *constitutionally* established maximum price is the only proper standard of 'just compensation'." (Italics ours.) But the question presented in the instant case was expressly reserved in the following paragraph (p. 646):

> **"If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented. Here we have price regulation of meat products on a national scale with judicial review of those regulations. The Government sought for itself no unique opportunity to purchase."**

Mr. Justice Frankfurter, with whom Chief Justice Vinson and Mr. Justice Burton concurred, considered that the plaintiff had not carried the burden of establishing that "the pecuniary equivalent of the property taken" was more than the O. P. A. price.

Mr. Justice Rutledge, in a separate concurring opinion, likewise considered it unnecessary to decide more than that the plaintiff had not sustained the burden of proving that he was entitled to more than the ceiling price.

A dissenting opinion, concurred in by Mr. Justice Douglas, was filed by Mr. Justice Jackson.

The relationship between just compensation and O. P. A. ceiling prices was again considered by this Court in *United States* v. *Commodities Trading Corp.*, 1950, 339 U. S. 121, which arose in 1944 out of a requisition of whole pepper. The pepper was being withheld from the market for an eventual price increase expectable in accordance with a

cyclical price pattern peculiar to the pepper market. The Court of Claims allowed the owner "retention value" at 15¢ per pound instead of the O. P. A. ceiling price of 6.63¢ per pound. *The latter price "approximated the market price at the time the free market in pepper came to an end"* in December, 1941. In a 5 to 2 decision (the Chief Justice and Mr. Justice Douglas taking no part), this Court reversed and directed the Court of Claims to enter judgment based on the maximum ceiling price.

The majority opinion, written by Mr. Justice Black, rejected "retention value" as being too speculative and discriminatory. It adopted the O. P. A. ceiling price as "fair" to the owner and the government (pp. 124-5) because the statute required that the O. P. A. ceiling prices be "generally fair and equitable", because the statute provided for judicial review, because the ceiling prices were the actual market prices and because the government "should be able to buy goods fulfilling their wartime needs at the prices fixed for *other* purchasers" (pp. 124-5, emphasis ours). The majority further recognized that *"there must be room for special exceptions to such a general rule"* (p. 128). It held, however, that there was no showing of "any unfair and disproportionate burden" upon the plaintiff (p. 129).

Separate dissenting opinions were written by Mr. Justice Frankfurter and by Mr. Justice Jackson.

The lack of any resemblance between the questions presented in the *Felin* and *Commodities* cases and the situation in the instant case is apparent from the following brief summary:

(1) One outstanding difference is that the O. P. A. ceiling prices were primarily established to fix "fair and

equitable prices" in sales transactions between private parties generally as a safeguard to the national economy whereas the predominant purpose of the rate "restrictions" here involved was to enable the government agencies to acquire the use of privately-owned vessels at price levels fixed by those agencies below current fair market prices.

(2) The O. P. A. price ceilings merely "froze" the actual market prices existing when the ceilings were imposed. The price schedules here in question were admittedly arbitrary reductions to levels ultimately more than 50% below the fair market rates approved by the requisitioning agency immediately before issuing its first schedule.

(3) Unlike the Emergency Price Control Act of 1924 (cited above), the Ship Warrants Act (cited above) contained no authorization for general administrative price fixing. On the contrary, the stated purpose of the Warrants Act was to obtain priority for water transportation of defense materials at the request of the defense agencies. Further discussion of this point appears at pp. 30-32 of this petition.

(4) Even if authority for general price fixing could be read into the Ship Warrants Act, the price schedules of the Maritime Commission would be unconstitutional and void because they were prepared and issued without any compliance whatever with the requirements of "due process of law". Amplification of this point appears at pp. 32-3 of this petition.

(5) No provision whatever was made for judicial review of rate schedules issued under the Ship Warrants Act.

In effect, this case is the converse of *United States* v. *Cors*, 337 U. S. 325. In that case the Court of Claims had allowed full actual market value as just compensation for a tugboat requisitioned in 1942. That Court had also found that some unstated part of that price represented enhancement caused by prior requisitions.* This Court reversed with directions that such enhancement should be excluded because it would be unfair to require the government to pay any portion of the market price "which its demand alone has created" (p. 333).

Of necessity, the concept of "fairness" expressed in the *Cors* decision requires that the compensation also be fair to the property-owner and this Court so held in the *Commodities* case (339 U. S. 121 at 123).

If, in the *Cors* case, it was unfair to the government to increase compensation by including enhancement of market price caused by the government's needs and activities in the market for the property, then it seems beyond doubt that it would be unfair to the property-owner *to reduce compensation below fair market levels* because of price restrictions on the property deliberately imposed by the government to bring about such reduction.

Therefore, this case presents a constitutional question of outstanding general importance which has not been but should be decided by this Court.

II.

The second major question presented by this petition arises from the effect which the Court of Claims gave to petitioner's acceptance of the requisition *time charter* rate

* On rehearing, the Court of Claims held that its previous finding had been erroneous and that the enhancement, if any, was "negligible". *Cors* v. *United States*, 119 C. Cls. 296.

offered by the War Shipping Administration as compensation for the use of the *Hawaiian* under her requisition in 1942 on "time charter basis". That requisition terminated upon the government's taking full possession of the *Hawaiian* in July, 1943, under a requisition on "bareboat basis" from which this suit arose.

The coercive circumstances under which petitioner's acceptance occurred are described in the Commissioner's Finding No. 30 (App. 68-70), and in the Court's Findings 25 and 26 (App. 106-8), and are also briefly mentioned in the opinion (App. 85). The Court said (italics ours): "the War Shipping Administration had fixed a rate for time charters * * * which had been agreed to by the owners, including plaintiff, *reluctantly, it is true, and after threat of requisition of title by the War Shipping Administration,* but nevertheless agreed to. Applied to the *Hawaiian* this would have amounted to $4.35 * * *. [After deducting operating cost of $1.89 per deadweight ton per month] * * * this leaves $2.46. Plaintiff accepted this, *although under some compulsion. It cannot be denied, however, that the War Shipping Administration 'beat the owners down' as much as they could in establishing a rate of hire.*"

Plainly, therefore, by approximating that $2.46 figure when it fixed compensation at $2.50, the Court of Claims gave to petitioner's acceptance of the requisition time charter rate a substantially conclusive, though indirect, effect as the measure of just compensation under the bareboat requisition. This was done notwithstanding the coercion under which the time charter rate was accepted and notwithstanding the arbitrary nature and low level of the requisition time charter rate schedules as one of the

series of arbitrarily reduced schedules issued by the requisitioning agencies.

The irreconcilability of that holding with the basic requirement of "fairness" in determining just compensation (*United States* v. *Cors*, 337 U. S. 325 at 332-4 and *United States* v. *Commodities Trading Corp.*, 339 U. S. 121 at 123) is too obvious to need elaboration.

The holding is equally irreconcilable with the established standard of probable fair market value as the practical measure of just compensation. That standard rendered the contract which arose from petitioner's acceptance of the time charter rate plainly irrelevant because it could not possibly fulfill the basic test of being a transaction resulting "from *fair* negotiations between an owner willing to sell and a purchaser desiring to buy." *Brooks-Scanlon Corp.* v. *United States*, 1924, 265 U. S. 106, 124; *Standard Oil Co.* v. *Southern Pacific Co.*, 1925, 268 U. S. 146, 155. See also Rule 3 in the Report of President's Advisory Board on Just Compensation*, December 7, 1943.

Indeed, even if evidence of actual coercion had been lacking, the contract would still have been irrelevant because the mere fact that a transaction is with an agency having the power of eminent domain has generally been held to be sufficient ground for disregarding it in the determination of fair market value. The possibilities are too great that such transactions are not freely arrived at between willing sellers and willing buyers under fair

* The Report of the Advisory Board (which was appointed on October 15, 1943 by Executive Order 9387, 8 Fed. Reg. 14105) was not officially reported. It is unofficially reported in 1943 A. M. C. 1443 and appears at pp. 31-33 of Plaintiff's Exhibit 51 in this case. The Report was mentioned with approval in *United States* v. *Cors*, 337 U. S. 325 at 330, 334-5, and in *United States* v. *Toronto etc. Nav. Co.*, 1949, 338 U. S. 396, 403, 405.

market conditions. *Orgel, Valuation under Eminent Domain,* Sec. 146, 489-494; *Lewis on Eminent Domain* (3d Ed.), Vol. II, Sec. 667, p. 1147; *Nichols on Eminent Domain,* 2d Ed., Sec. 456; *United States* v. *Foster,* 1942, C. C. A. 8, 131 F. (2d) 3, 5; *United States* v. *Reynolds,* 1940, C. C. A. 5, 115 F. (2d) 294, 296; *United States* v. *Bailey,* 1940, C. C. A. 5, 115 F. (2d) 433, 434; *Five Tracts of Land* v. *United States,* 1900, C. C. A. 3, 101 Fed. 661.

Earlier, the Court of Claims itself had declined to give effect to much less drastically low requisition rates of the old Shipping Board notwithstanding acceptance by "a very large percentage" of shipowners. *Gulf Refining Co.* v. *United States,* 58 C. Cls.

From the standpoint of constitutional law, the holding of the Court below is shocking because the safeguard of the Fifth Amendment would vanish if the rates of compensation arbitrarily established by requisitioning agencies should automatically become the measure of just compensation merely by showing that some property-owners had accepted the rates in other transactions, especially if such acceptances were under compulsion.

III.

The third major question presented arises from the great weight given by the Court of Claims to the charter rate schedules issued by the requisitioning agencies in the course of administering the Ship Warrants Act and requisition programs. Those schedules were treated as "lawful legislative and administrative restrictions" relevant to determination of just compensation (Opinion, App. 83).

In the first point of argument, it has been shown that the schedules were invalid "restrictions" because of the

confiscatory purpose intended to be accomplished by their enforcement. Even if that purpose had not existed, however, those schedules could not constitutionally be given effect as general price-fixing regulations affecting just compensation either for American freighters as a class or for the *Hawaiian* in particular.

To give those schedules any effect would be inconsistent with the guarantees of the Fifth Amendment. That is so because: 1. The statutes involved did not authorize general price fixing; 2. The schedules would be void in any event as general price regulations because they were not issued in compliance with the requirements of due process of law; 3. The schedules under the Warrants Act were never legally effective as to petitioner because petitioner never gave an undertaking to observe the schedules; and 4. The licensing feature of the Warrants Act could not give constitutional validity to the otherwise invalid schedules.

1. Although one or the other of two statutes, the Ship Warrants Act (App. 121-4) and the Merchant Marine Act, 1936, (App. 119-121) was claimed to authorize each of the four successive schedules of rates constituting the "legislative and administrative restrictions", (See pp. 13-16, *supra*) it is clear that no general price-fixing authority could be derived from the requisitioning section (Section 902) of the Merchant Marine Act. That section (App. 119-121) only authorizes the ship requisitioning agency to offer the owner of the requisitioned ship such amount as, in the agency's judgment, will be just compensation. The statute specifically preserves the right of the property-owner to reject such rate, to accept 75% of the amount

offered and to sue "for such further sum as, added to said 75 per centum, will make up such amount as will be just compensation" (Section 902b).

Manifestly the Merchant Marine Act did not attach even presumptive weight requisition rates offered by the requisitioning agency and the Court of Claims so held in its opinion. (App. 84) Consequently, the two requisition rate schedules issued in May, 1942 and in April, 1944, respectively, had no statutory authority as general price-fixing regulations.

Therefore, only the Ship Warrants Act will be discussed further.

The Ship Warrants Act is printed in full in the Appendix (App. pp. 121-4), but its legislative history, so far as rate regulation is concerned, and its principal provisions are summarized in the Commissioner's Finding No. 25 (App. 58-60).

Congress never intended the Act to be price legislation. The understanding of the House was expressed by the committee report on the bill as follows (House Report No. 526, May 12, 1941, U. S. Code Congressional Service, 77th Congress, 1st Session, 1941 Volume, p. 658, West Pub. Co.):

> **"The legislation does not contemplate governmental prescription of rates now agreed to by conferences, but would accord a measure of control over shipping by means of a commercial bargain with vessel owners and charterers."**

The probable understanding of the Senate is obvious from the following written representation submitted by the Maritime Commission at the conclusion of the Senate Committee hearings, (Pl. Ex. 214 at p. 46):

***Conclusion.*—The bill is designed and will be administered only as priorities legislation, a regulatory plan for which there is ample legislative precedent and which will meet a vital need of our defense and our domestic economy.**

The bill does not authorize nor will it be administered as a direct or indirect means of taking property or putting it to a public use without just compensation.

Even without that legislative history, the terms of the Act itself (Section 4) clearly restrict its function to effecting priorities in the transportation of defense materials. American freighters were then already operating at capacity in the carriage of commercial cargoes (Finding No. 7, App. 90).

The machinery for effecting such priorities consisted of a scheme for licenses (called "warrants") (Sec. 1), entitling vessels to *priority* in procurement of fuel and other necessaries in United States ports (Section 3). In return for the warrant, the ship-operator receiving it was required to give an undertaking to comply with the orders of the Maritime Commission regarding the employment of his vessel, the cargoes to be carried and the "fair and reasonable maximum rate of charter hire or equivalent" to be charged by the ship-operator (Section 2).

The foregoing statement of the scheme and tenor of the Act are sufficient to demonstrate that no Congressional authorization for price-fixing regulations of general application to merchant ships can fairly be drawn from the provisions of the Ship Warrants Act.

While it is true that Congress authorized the Maritime Commission to require warrant-holders to observe a "fair and reasonable maximum rate", such authorization was

clearly limited in purpose and merely incidental to the stated purpose of the Act to obtain priority for defense transportation.

Such rate schedules were necessary to avoid delays and overcharges in the enforcement of priorities for the carriage of defense materials by warrant-holding vessels. In the absence of such schedules the Commission would merely be entitled to specify the transportation to be performed by a given vessel on a given voyage, but the charges would have to be the subject of bargaining and delay.

2. Even if there had been statutory authorization for the general fixing of shipping rates, however, the actual rate schedules issued would have no general validity under any constitutional price-fixing statute for two reasons:

(a) Throughout their administration of the Ship Warrants Act, the Commission and the War Shipping Administration disregarded even the rudiments of "due process of law". (See Commissioner's Findings Nos. 26 (a) and 26(c), App. 60-62). In regulation by an administrative agency, the minimum requirements of "due process" are: (i) that reasonable notice of the proposed regulation be given to the parties to be affected; (ii) that there be a fair and open hearing at which such parties have an opportunity to present evidence and argument in opposition; (iii) that the agency action shall be authorized by law, based on findings supported by substantial evidence adduced at the hearing and shall not be arbitrary and capricious. *Morgan* v. *United States,* 1937, 304 U. S. 1, 14; *Yakus* v. *United States,* 1944, 321 U. S. 414; *Wong* v. *McGrath,* 1950, 339 U. S. 33.

Even if wartime conditions could extenuate the lack of notice and hearings regarding the schedules, they would

unquestionably have been invalid as agency regulations affecting private shipping generally because the schedules were wholly unsupported by any findings or substantial evidence and were both arbitrary and capricious.

Indeed, it is hard to imagine what evidence could have been adduced to support the necessary findings. It would have involved a self-contradiction to find that, at a time when shipping was in great demand, it was "fair and reasonable" arbitrarily to reduce fair and approved current market rates for the use of ships by more than a third at first and, ultimately, by more than half. Moreover, it is impossible to see how such action could reasonably be found to be in furtherance of the stated purpose of the Ship Warrants Act to obtain priorities for defense transportation.

(b) In the second place, the rate schedules were confiscatory because arbitrarily fixed at levels more than 50% below current fair and reasonable market rates. If given compulsory force, such rates would constitute confiscation of half the earning capacity of any vessel affected and would be quite as indefensible as a regulation purporting to require half the physical carrying capacity of the vessel to be placed at the disposal of the government free of charge. No constitutional statute can authorize confiscation.

Moreover the schedules violated Section 2 of the Warrants Act itself which only authorized imposition of a "fair and reasonable maximum rate of charter hire" as a condition of issuing ship warrants.

3. In any event, the rate schedules were never effective as to petitioner because it declined to give the undertaking necessary to obtain a warrant (Finding No. 20, App. 101).

4. The final and perhaps the most important constitutional objection to the rate schedules as affecting just compensation lies in the fact that the requisitioning agencies appear to have assumed that they were entitled to dispense with the requirement of due process of law because the Warrants Act was in the form of a licensing scheme. On its face, the scheme appeared to give a ship-operator freedom of choice whether or not to give an undertaking to observe the regulations imposed as a condition of obtaining the supposed advantages in respect of procurement of supplies. But, in fact, the Act was administered by the requisitioning agencies so as to make it "progressively impossible * * * for American shippers to operate without acceptance of the government's rates" (Finding No. 18, App. 100).

In other factual settings, this Court has been vigilant in preventing the use of the licensing device to circumvent the Constitutional requirement of "due process of law". (*Frost Trucking Co.* v. *Railway Commission,* 271 U. S. 583 at 593; *U. S.* v. *Butler,* 1936, 297 U. S. 1, at p. 70.)

This case presents the question whether the licensing device can be used to avoid the requirements of the just compensation clause of the Fifth Amendment.

The magnitude of the question is obvious. As this Court said in *United States ex rel. T. V. A.* v. *Powelson,* 1943, 319 U. S. 266, at 284:

> "The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation."

CONCLUSION.

Petitioner respectfully urges that the writ of certiorari requested by this petition be granted.

July 29, 1955.

Respectfully submitted,

CLEMENT C. RINEHART,
Counsel for Petitioner.

KIRLIN, CAMPBELL & KEATING,
Attorneys for Petitioner.
120 Broadway,
New York 5, N. Y.

APPENDIX TO THE PETITION.

PART I.

COMMISSIONER'S REPORT, OPINION, FINDINGS, JUDGMENT AND MOTION FOR REHEARING IN THE UNITED STATES COURT OF CLAIMS.

INDEX.

	PAGE
Report of commissioner	39
Argument and submission of case	79
Opinion of the court by Whitaker, J.	79
Findings of fact	87
Conclusion of law	117
Order of the court entering judgment	117
Defendant's motion for rehearing	118

REPORT OF COMMISSIONER.

(Filed June 30, 1953.)

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case the undersigned commissioner herewith makes the following report of his findings of fact:

1. At all times relevant to this case, the American steamship *Hawaiian* was wholly owned by the plaintiff, American-Hawaiian Steamship Company, a New Jersey corporation, organized in 1899. On July 7, 1943, at 6:50 p. m., the defendant, acting through the War Shipping Administration, took the possession and use of the *Hawaiian* at Baltimore, Maryland, on "bareboat basis." The taking was by requisition under authority of Section 902 (a) of the Merchant Marine Act, 1936, as amended. Possession and use of the vessel by the War Shipping Administration under such requisition continued until she was redelivered to the plaintiff at Richmond, California, on May 1, 1946, at 12:00 midnight.

2. By letter dated July 31, 1944, the War Shipping Administration tendered plaintiff a demise or "bareboat" form of charter party describing the *Hawaiian* as having 9,460 tons deadweight capacity and setting forth proposed terms of the use of the *Hawaiian* during the bareboat requisition period, including an offer of hire at the rate of $12,108.80 per calendar month. The terms of the charter tendered were those prescribed by War Shipping Administration General Order No. 13, Supplement 1, issued April 7, 1944. The hire offered was specified in War Shipping Administration General Order No. 37, also issued April

7, 1944, "to establish * * * rates of charter hire for self-propelled ocean-going iron and steel vessels * * * requisitioned for use pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended * * *." Under General Order No. 37, the rate of bareboat hire for dry cargo vessels built during the period 1914-1934 was $1.25 per deadweight ton per month, with certain additional allowances for vessels having speeds equal to or in excess of 11 knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, being the sum of $1.25 and an additional $0.03 provided for vessels having speeds equal to or exceeding 11 knots but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots (see finding No. 4), she was entitled under General Order No. 37 to $0.06 instead of $0.03 in addition to the basic $1.25 per deadweight ton per month.

3. On August 24, 1944, plaintiff wrote the War Shipping Administration declining to accept either the form of charter or the rate of hire offered. As required by Section 902 (d) of the Merchant Marine Act, 1936, as amended, defendant made, between March 24, 1944, and August 16, 1946, monthly payments to plaintiff aggregating $307,079.74, on account of just compensation for the use of the *Hawaiian*. The aggregate amount of such payments on account was equivalent to hire at the monthly rate of $9,081.60 or 96¢ per deadweight ton for the bareboat requisition period of 33 months, 25 days, 5 hours and 10 minutes and was also equivalent to 75% of hire at the rate of $1.28 per deadweight ton per month, tendered by defendant on July 31, 1944.

Thereafter, plaintiff brought this suit to recover, as just compensation for the use of the *Hawaiian*, hire at the rate of $6.00 per deadweight ton per month, less the hire which the defendant has already paid on account at the rate of 96¢, the net compensation claimed being equivalent to $5.04

per deadweight ton per month. In addition, plaintiff also claims compensation for defendant's delays in payment. The *Hawaiian's* net earnings had been at the rate of $6.16 per deadweight ton per month (before depreciation and taxes), on her last voyage before she entered defendant's service under a time charter to the United States Maritime Commission on January 9, 1942.

Settlement has been made of the claims of plaintiff and defendant, respectively, for consumable stores and fuel aboard the vessel when the requisition period began and ended and also of plaintiff's claims for reconditioning of the vessel on her release from requisition. Plaintiff has not made any assignment or transfer of its claim for just compensation for defendant's use of the *Hawaiian* under bareboat requisition or of any part thereof or interest therein.

4. At all times material to this suit, the *Hawaiian* was a steel, ocean-going, single-screw, steam freighter built in 1919, documented under the laws of the United States, and was classed A1 by the American Bureau of Shipping.

Her deadweight carrying capacity was 9,460 tons and her bale cubic capacity was 413,495 cubic feet. She was designed to carry all types of goods, except liquids in bulk and refrigerated cargo, but was especially well suited for the carriage and handling of general cargo by reason of having three complete decks, an extra (orlop) deck in No. 1 hold, 5 cargo hatches, and 7 sets of cargo gear.

The vessel's propelling machinery consisted of quadruple-expansion, reciprocating engines of 3,400 indicated horsepower and four oil-burning, scotch-type boilers, giving her a speed in excess of 12 knots. By reason of her bunker capacity of 16,306 barrels and daily consumption of 206 barrels, the *Hawaiian* had a cruising radius of 23,420 miles.

The register dimensions of the vessel were: length, 404.6 feet; breadth, 53.9 feet; depth, 26.2 feet. Her draft on

summer load line was 28′ 5¼″ and her corresponding gross register tonnage was 6,264 tons.

Her equipment included a heavy lift boom, special lockers for valuable cargo, radio direction finder, electric sounding machine and spare parts in excess of those required by the American Bureau of Shipping.

The crew complement, including master, was 39.

5. Surveyors and inspectors representing both plaintiff and defendant examined the *Hawaiian*, both in drydock and afloat, at or about the time of her taking in July, 1943, and found her to be in good condition.

Her good condition and dependability were further shown by the following table showing the favorable comparison between her performance throughout her government service and the average performance of newly built Liberty vessels operated by plaintiff as agent for the War Shipping Administration:

	Hawaiian	Five Liberties	
		Total	Average
Operating period	1,371 days	6,233 days	1,246 days
Steaming time	672 days	2,809 days	562 days.
Average speed	10.4 knots		9.5 knots.
Repairs at sea	6 hours 1 d	16 h. 42 m	8.1 hours.

6. Neither at the time of her taking nor at any subsequent time during the bareboat requisition period of the *Hawaiian* was there a free market in the United States for the use of large, ocean-going, American-flag freighters because on April 18, 1942, the use of all such privately-owned vessels had been requisitioned on "time charter basis" by the War Shipping Administration. The War Shipping Administration continued to retain possession and use of substantially all such freighters from April 1942, until after March 2, 1946.

The period of Government use of a number of such freighters began even prior to the general requisitioning in April 1942. The United States Maritime Commission and

its successor agency, the War Shipping Administration, had acquired the use of many such freighters by chartering them directly at various times after June 2, 1941. Those agencies had also controlled the employment of various other freighters by directions given in the course of administering the Ship Warrants Act of July 14, 1941 (55 Stat. 591). In such cases, the agencies prescribed the rates of charter hire at levels generally below current market rates. (See Finding No. 26.)

7. Notwithstanding the absence of any commercial market from the general requisitioning in April 1942 to the end of requisitioning in the first half of 1946, the value of the use of large, American-flag freighters like the *Hawaiian* throughout such period may be ascertained from the evidence on five points:

(a) The worldwide conditions which contributed to an increase in the commercial earning power of such freighters between the outbreak of war in Europe in September 1939 and the first use of freighters by our Government in 1941 (see Finding No. 8);

(b) The level of commercial earning power which, as a result of such conditions, such freighters had already attained from employment by their owners for their own account at and prior to the time when defendant took their use in April 1942 (see Findings Nos. 9-17);

(c) The continuance throughout the requisition period of the same conditions which had brought about the level of earnings existing in April 1942 (see Finding No. 18);

(d) Defendant's actual earnings at substantially the same level realized during the requisition period when defendant employed freighters for nonmilitary use (see Finding No. 19); and

(e) The continuance of a comparable level of earnings in 1946 after defendant returned such freighters to their owners (see Finding No. 20).

In determining the amount of hire constituting just compensation during such period, it is further necessary to determine and deduct the amount, if any, of the enhancement included in such value due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type or to a prospective taking reasonably probable.

8. Worldwide changes in conditions affecting the profitability of commercial merchant shipping occurred as a result of the outbreak of war in Europe in September 1939.

Prior to the war, there had been an oversupply of shipping throughout the world and particularly in the United States. Afterwards, a worldwide shortage of vessels available for trade developed and, by the end of 1940, shipping space was hard to get. For the first time in years, capacity cargoes were available both outward and homeward.

Under such conditions, economic factors, applicable alike to water and rail carriers, caused earnings of carriers to increase in much higher proportion than the mere rate of increase in traffic, one principal cause being the fact that the costs of carriage do not increase proportionately to increases in the quantity of cargo carried per vessel or train or in the length of the haul. It follows also that an increased rate of earnings does not imply an increase in the level of tariff rates charged to shippers.

As a result of the foregoing conditions, the commercial earning power of large, American freighters rose sharply during the period 1939-41.

There is no evidence that the ocean tariff rates charged to shippers at the levels fixed by conference carriers at any time exceeded rates justifiable under the conditions.

None of the increased carryings of American-flag freighters during the two years following November 4, 1939, included munitions of war or other traffic to or from the combat zones in Europe because the Neutrality Act of

November 4, 1939 (54 Stat. 4), excluded our merchant vessels from those zones.

Among the principal underlying causes for the increase in carryings and earning power of American freighters, aside from the Government's need for shipping, were the following:

(a) The decrease in the effective world supply of freighters available for commercial employment as a result of such war conditions as sinkings, immobilization by blockade, delays by war damage, delays by convoy operations in combat zones, and diversion by belligerents of their own merchant vessels to military use or to use in combat areas from which our shipping was excluded by the Neutrality Act;

(b) The increase in volume of traffic available to American-flag freighters in foreign trade by the decline in competition from foreign-flag freighters on routes outside the combat zones;

(c) The increased proportion of traffic producing higher freight revenues resulting from increased exports of manufactured goods from the United States after Europe was cut off as a source of supply to other world areas;

(d) The general improvement in business conditions in the United States.

9. The earnings of freighters are derived from two principal kinds of operations: (a) charter operation; and (b) berth operation. In addition, some vessels are operated by industrial carriers serving primarily their parent companies.

(a) In a charter operation, a single charterer contracts with the shipowner for the entire carrying capacity of the vessel in consideration of which the charterer agrees to pay the shipowner either a monthly rate of charter hire, as in the cases of bareboat charters and time charters, or an

agreed freight per voyage, as in the case of voyage or "trip" charters. Voyage charter freight may be fixed at a stated rate per ton or other unit of cargo (a rate charter), at a stated rate per unit of the vessel's cargo space (a space charter), or at a lump sum (lump sum charter).

Under the usual bareboat charter, the charterer has full possession and operation of the vessel and pays all expenses, including upkeep.

Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses and also for war risk insurance on the vessel.

Under a voyage charter, the shipowner operates the vessel at his expense. The cargo and port expenses and cost of war risk insurance may be borne either by the shipowner or charterer or partially by each, depending on the terms of the charter. Under a "net form" voyage charter, the charterer or cargo owner pays the expenses incident to the loading and discharge whereas under a "gross form," the ship pays such expenses.

If a charterer is a common carrier or if he subcharters to others, his profit is the difference between (a) the charterer's revenue from freights which he obtains from the actual shippers of cargo or from the subcharterer, and (b) the charterer's expenses which include charter hire or freight and such vessel, voyage, cargo or other expense as the terms of the charter may place on the charterer.

(b) In berth operation, the shipowner is a common carrier transporting goods for the general public at freight rates fixed in conference or other tariffs and paying all the expense of the operation. The entire earning power of the vessel is realized by the shipowner in berth operations, instead of being divided between the owner and the charterer as in charter operations.

10. The earnings of plaintiff's fleet of 32 freighters in 1941 and in 1942, up to the time of their requisitioning by defendant on time charter basis, were derived from operations both in the domestic and foreign trades. In the domestic intercoastal trade plaintiff maintained a berth operation. In the foreign trade plaintiff engaged in both charter operations and berth operations with 20 of its vessels.

Plaintiff's charter operations in foreign trade in 1941 and 1942 (other than those under certain time charters to the United States Maritime Commission, see Finding No. 24 (g)), were of two kinds: (a) under 10 commercial time charters made to other private operators; and (b) under 10 space charters to the British Ministry of War Transport for voyages outward from the United States to ports in the Red Sea.

Plaintiff's berth operations in foreign trade consisted of: (a) return voyages to the United States after conclusion of the space charters to the Red Sea; and (b) round voyages between the United States and ports in South Africa.

11. The average earnings realized by plaintiff from all voyages which commenced in 1941 and terminated in 1941 or 1942 by all plaintiff's vessels operating in foreign trade (except from voyages under charters to the Maritime Commission), were as follows:

Plaintiff's average 1941-42 earnings in foreign trade

[From Plaintiff's Exhibit 25]

	Deadweight, ton months	Profit
1. Time charters (11 voyages)	650,796.57	$3,144,473.61
2. Space charters outward and berth voyages homeward (10 voyages)	547,128.69	3,106,878.53
3. Berth voyages to South Africa (3 voyages)	132,762.67	573,455.02
Total	1,330,687.93	6,824,807.16

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-1942

(Before overhead, depreciation and taxes)

$$\frac{\$6,824,807.16}{1,330,687.93}=\$5.13$$

The profits of plaintiff's 9 vessels operated on the 11 time charter voyages shown above did not represent the full earning power of the vessels on those voyages because, in order to determine a vessel's full earning power in a time charter operation, the profits of the time charterer must be added to the profits of the shipowner. (See Finding No. 9, and because four of the voyages were under time charters made in January or March 1941, at rates below the level which prevailed later in 1941). (See Pl. Exs. 25B, 25G, 25H, 25I.)

Eliminating the time charter voyages, the average profit of the 13 other voyages was as follows (from plaintiff's Exhibit 25):

	Deadweight, ton months	Profit
Space charters outward and berth voyages homeward	547,128.69	$3,106,878.53
Berth voyages to South Africa	132,762.67	573,455.02
Total	679,891.36	3,680,333.55

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages (1941-42), except those under time charters:

(Before overhead, depreciation and taxes)

$$\frac{\$3,680,333.55}{679,891.36}=\$5.41$$

Earnings exceeding $6.00 per deadweight ton per month after overhead but before depreciation and taxes were actually realized by seven of defendant's vessels, including

the *Hawaiian*, on certain of the voyages included in the foregoing statement.

Plaintiff's earnings were actually higher than those stated in the above table because plaintiff's marine insurance on its vessels prior to December 24, 1941, was carried in defendant's own self-insurance fund at a rate of 3% on a valuation of about $50 per deadweight ton; whereas in computing insurance expense for periods prior to December 24, 1941, in the above statement, plaintiff took the cost of insurance at actual market rates, which were 3½% on a valuation of $100 per deadweight ton.

12. The earning power of the *Hawaiian* per deadweight ton per month was somewhat greater than the average earning power shown in Finding No. 11 for all plaintiff's vessels engaged in foreign trade in 1941-42.

13. The earnings realized by plaintiff's vessels were merely typical of the earnings being realized in foreign trade by large American freighters generally during the period immediately preceding the general requisitioning in 1942. (See Findings Nos. 14, 15, 16, and 17.)

14. Illustrative of the earnings available in foreign berth operations are the earnings of three American freighters of the Hog Island type, which States Marine Corporation bought in late 1940 or early 1941.

Before the outbreak of war in Europe in September 1939, States Marine Corporation operated entirely with chartered foreign-flag vessels. The number of charters which they made per year averaged about 300. An average of 40 time chartered vessels was used to maintain about twelve berth services from the United States to Europe, South Africa and Japan. In addition, the company engaged in numerous full cargo trades and acted as agents for others.

As a result of the scarcity of foreign-flag vessels in 1940, the company began chartering American-flag vessels and

also purchased the three Hog Island vessels in question. Until they were requisitioned on time charter basis in 1942, these three vessels were employed on 23 voyages in the company's berth service between the United States and South Africa. The first voyage began on October 30, 1940, and the last voyage terminated on May 13, 1942. The average profit of the three vessels while so operated amounted to $4.92 per deadweight ton per month (Plaintiff's Ex. 38).

Hog Island type vessels are of about 8,000 tons deadweight carrying capacity and about 10½ knots speed. If the *Hawaiian* had been employed on the same voyages, her greater speed and carrying capacity could have produced additional earnings of about 50¢ to 75¢ per deadweight ton per month, equivalent to total earnings of about $5.42 to $65.67 per deadweight ton per month.

15. The profitability of American freighters in charter or "tramp" operations in foreign trade during 1940-42 is shown by the earnings of two Hog Island vessels, the *Ann Skakel* and the *Patricia Skakel*, purchased in December 1940 and January 1941, respectively, by subsidiaries of Parry Shipping Company, Inc., of New York. Operating under various forms of charter, the vessels loaded or discharged cargoes in the United States, the Far East, India, South America, Canada and West Africa.

From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1941, her earnings were $4.22 per deadweight ton per month, although most of that time she was under a time charter dated February 19, 1941, at a hire of $5.50 per deadweight ton per month, a figure well below the current market rate of $7.50 prevailing before the Ship Warrants Act schedules of time charter hire were issued on July 30, 1941.

The first voyage of the *Patricia Skakel* consisted of a space charter from New York to Vladivostok, a voyage charter for a cargo of sugar from Java to Ceylon and a voyage charter with a cargo of ore from India to Balti-

more, occupying 176 days from the beginning of loading in New York on January 29, 1941. From that round voyage the vessel's gross revenue was $492,368.33 and her net profit, $298,546.98, equivalent to $6.36 per deadweight ton per month.

The remaining voyages of the *Patricia Skakel,* commencing in July 1941 and occupying about 384 days, included two coal voyages to South America at low rates directed by the United States Maritime Commission in connection with its administration of the Ship Warrants Act, and did not represent the best business available to the vessel. Even so, the average profit realized by her owner from the entire operation up to September 19, 1942, when defendant requisitioned title to the *Patricia Skakel,* amounted to $4.25 per deadweight ton per month.

Excluding the second fiscal year's operations of the *Ann Skakel* under time charter and those of the *Patricia Skakel* involving voyages at Warrant Act rates, the combined earnings of the two vessels were:

	Voyage days	Profit
Ann Skakel	316	$354,981.87
Patricia Skakel	176	298,546.98
Total	492	653,528.85

Deadweight ton months—

$$492 \times 8000 = \frac{3,936,000}{30} = 131,200$$

Average earnings per deadweight ton per month

(Before depreciation and taxes)

$$\frac{\$653,528.85}{131,200} = \$4.98$$

As the *Hawaiian* was about 20% faster and larger than the two Parry vessels but would operate for approximately the same cost, the *Hawaiian's* earnings would have been at a higher rate if she had performed the same business.

16. Reports submitted to the Maritime Commission by operators of large, American freighters giving the financial results of 340 voyages terminating in the last quarter of 1941 or early 1942, fully confirm the fact that immediately prior to the general requisitioning in 1942, the average earnings of such freighters generally in overseas foreign trades approximated the average earnings of plaintiff's vessels in those trades, as shown in Finding No. 11. Those voyages included 149 in foreign overseas trades by freighters built before 1935. The freighters making 103 of the voyages were privately owned and operated. The other 46 voyages were by Government-owned freighters chartered on bareboat basis to private operators.

An analysis by certified public accountants of the 103 voyages in the foreign overseas trade by privately-owned and operated freighters shows the average earnings of such freighters (before depreciation, overhead expense and taxes), to have been as follows:

Foreign overseas berth operations by privately owned and operated vessels

Schedule in Pl. Ex. 64	Voyages	Average profit per d. w. t. per mo.
A	68	$5.50

Foreign overseas time charter operations by privately owned vessels

	Schedule in Pl. Ex. 64	Voyages	Average profit per d. w. t. per mo.
Owners' profit	B	17	$4.44
Charters' profit	C	18	1.15
Total vessel earnings			5.59

Although the financial results of the 46 voyages made by Government-owned freighters under bareboat charter to private operators are not strictly comparable because of the smaller size of the vessels, their relatively higher operating expense and certain differences in trades, nevertheless they

furnish additional proof of the profitability of freighter operation in 1941-42 as the following table shows:

Foreign overseas operations of Government-owned vessels bareboat chartered to private operators

[Pl. Ex. 64, Sched. D.]

	Voyages	Average profit per d. w. t. per mo.
U. S. M. C. hire	46	$2.21
Charterers' profit	46	2.67
Total vessel earnings		4.88

The foregoing table also shows that the Maritime Commission itself was collecting bareboat hire from private operators immediately before the general requisition at a rate far in excess of the amount $1.00 per deadweight ton per month which the War Shipping Administration included in its computation of requisition time charter hire as "bareboat" compensation to owners of requisitioned freighters. The Commission's average collections of $2.21 per deadweight ton per month did not represent a commercial bareboat market rate nor were they the full compensation collected by the Commission because the Commission's bareboat charters to private operators during the period 1940-41 in many cases required the operator to pay the Commission half of the profits in addition to a basic rate of hire. The basic rates of bareboat hire charged by the Commission ranged from $1.16 per deadweight ton per month in three charters made in May 1940 to $3.00 per deadweight ton per month in four charters made in May 1941. On some voyages the Commission collected $4.93 per deadweight ton per month and the charterer also realized a profit of $2.56 on the same voyages, equivalent in the aggregate to vessel earning power of $7.49 per deadweight ton per month.

17. Numerous admissions were made by officials of the Maritime Commission or War Shipping Administration, in

public statements and elsewhere, that earnings comparable to those shown in Findings Nos. 11, 14, 15, and 16 were being realized by owners of American freighters from commercial employment as distinguished from employment by the Maritime Commission or the War Shipping Administration in connection with their administration of the Warrants Act or the requisition program.

The Maritime Commission itself admitted and approved (until after the Ship Warrants Act became law on July 14, 1941), time charter rates of $7.50 per deadweight ton per month. Such a rate would yield a "bareboat" return or equivalent of $5.79 per deadweight ton per month, after deducting the actual average vessel and voyage expenses of $1.71 per deadweight ton per month incurred by plaintiff's vessels while engaged on 11 voyages under time charters during the period from February 2, 1941, to April 17, 1942.

The average "bareboat equivalent" realizable in 1941 from the time charter rate of $7.50 per deadweight ton by large freighters of various size groups was, according to defendant's own cost studies, as follows:

Size of vessel (deadweight tons)	Time charter hire	Vessel expense	Bareboat equivalent
	Per deadweight tons per month		
10,000 and over	$7.50	$1.45	$6.05
9,000 to 9,999	7.50	1.49	6.01
8,000 to 8,999	7.50	1.73	5.77

18. Although military demands were paramount throughout the period of defendant's use of the privately owned American freighter fleet under requisition, defendant continued to employ freighters for carriage of commercial and other nonmilitary cargo at conference tariff rates of freight or, in the case of bulk cargoes, at rates established by the War Shipping Administration.

Throughout that period, the conditions of demand for and supply of shipping space for nonmilitary purposes remained favorable to a continuance of the potential commercial earning power of large, American freighters at

levels not less than those prevailing immediately prior to the general requisition in April 1942, for the following reasons:

(a) The total world supply of freighters available for all purposes, military and nonmilitary, continued to decrease, principally as a result of Axis submarine and air attacks, until the latter part of 1943 when the losses were made up by new vessels constructed as a result of the emergency.

(b) New construction did not at any time create a surplus of freighters because military and other demands for shipping always exceeded the available supply.

(c) The value of our nonmilitary exports and imports during each of the requisition years, 1942-46, far exceeded the levels of 1941.

(d) Prices and corporate incomes in the United States in the years 1942-46 increased to and remained at levels far above those prevailing in 1941.

(e) The demand for carriage of nonmilitary cargo was such that use of shipping space for such purposes was restricted by Government permits and priorities.

(f) Increases in costs of vessel operation as a result of war conditions were offset by rate surcharges.

19. Specific confirmation of the continuance of the pre-requisition level of freighter earning power during the requisition period appears from the earning of $5.21 per deadweight ton per month realized by plaintiff's steamer *Utahan* from carriage of commercial cargo on three requisition voyages to South America during the period June 7, 1943 to February 21, 1944, which, moreover, includes the first seven months of the *Hawaiian's* bareboat requisition period. Because of the *Hawaiian's* superiority over the *Utahan* in speed, the *Hawaiian* could probably have earned $5.46 per deadweight ton per month on the same voyages.

Further confirmation that the prerequisition level of earnings could have been realized by freighters during the requisition period is furnished by the fact that the owner's expense factor under time charter operation did not increase greatly from the prerequisition levels shown in Finding No. 17. According to defendant's studies, the owner's expense factor under the requisition time charters amounted to an average of $1.882 per deadweight ton per month (see table in Finding No. 33). If the pre-Warrant Act time charter rate of $7.50 per deadweight ton per month (see Finding No. 17), had also been maintained (as the level of berth rates was apparently maintained according to the indications from the *Utahan's* earnings), the average resulting bareboat equivalent would have been $5.62 per deadweight ton per month, after deducting the average owner's expense factor of $1.88.

Admittedly, the War Shipping Administration realized a profit by the carriage of commercial and lend-lease cargo on freighters which it had requisitioned or owned. No evidence has been adduced by defendant to show that the general levels of earnings of freighters from carriage of commercial and lend-lease cargo for defendant's account during the requisition years was any lower than the prerequisition levels.

20. Immediately after release from requisition in 1946, American freighters found good business. When plaintiff's vessels were released, their earnings in 1946 for plaintiff's account in foreign overseas berth service averaged $4.93 per deadweight ton per month. The fact that such earnings were realized notwithstanding the cessation of hostilities which previously had caused military demands to absorb new construction, is further evidence that the commercial earnings power of freighters throughout the requisition period had equalled or exceeded its prerequisition level.

21. The fair and reasonable market value of the use of the steamer *Hawaiian* on bareboat basis throughout the

period of defendant's requisition of her use on such basis from July 7, 1943, to May 1, 1946, was from $5.00 to $6.00 per deadweight ton per month. (See Findings Nos. 11-20.) That value was being realized by the plaintiff immediately prior to the vessel's entry on Government service in January 1942 and could reasonably have been realized by the plaintiff if the vessel had not been taken by defendant, but had remained in plaintiff's possession and control.

22. The above findings set out facts which are not materially controverted and which are the basis of plaintiff's theory of the case. In short, it is plaintiff's theory that at the time of the requisition there was no free market and, therefore, the Court should consult the nearest free markets in point of time, in view of proof that the factors influencing such free market, that is supply and demand, prevailed throughout the period of requisition and would have been effective had the market remained free.

23. The defendant's theory of the case is likewise based on facts that are largely uncontroverted. It is a fact that after the Ship Warrants Act became effective the Maritime Commission and the War Shipping Board, by coercive measures pursuant to such Act, by collaboration with the British and with insurance underwriters, made it progressively impossible for American Shippers to operate without acceptance of the Government's schedule of rates, with the consequence that such rates came to be accepted by a substantial majority of such shippers. Having arrived at this situation, the defendant says its rates were the market or prevailing rates.

The defendant makes no contention that such rates bore any relation to the rates existing in the nearest free market or that such free market rates would not have remained at least as high had the market remained free. In fact, the record is replete with claims by the defendant that it destroyed the free market and effected a substantial roll back of rates. It must be remembered that, as stated above,

the Comptroller General ruled that the enhancement clause in Section 902 (a) of the Merchant Marine Act of 1936, prohibited the payment of compensation for vessels to the extent that it might be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the national emergency. In defending its rates in the face of this ruling, the Maritime Commission and/or War Shipping Board have pretty well presented the arguments for plaintiff herein. Plaintiff's exhibits 51, 54 and 78 contain examples of such statements.

24. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair market rates. They were rates promulgated in furtherance of an admitted purpose of those agencies to acquire for defendant, by coercion and other means, the use of privately owned American merchant vessels at rates of hire fixed by those agencies at levels representing drastic reductions in current market rates of charter hire, instead of being fixed at levels commensurate with the earning power which those vessels then had and continued to have for commercial purposes. The facts concerning the administrative acts of the Commission and the War Shipping Administration are set forth more fully in Findings Nos. 25 through 35.

25. The so-called Ship Warrants Act of July 14, 1941, authorized the United States Maritime Commission and its successor, the Administrator, War Shipping Administration, to prescribe certain conditions to be complied with by such shipowners or charterers as might undertake to do so as a condition of obtaining a license called a "ship warrant" entitling their vessels to priority in the use of certain shore facilities, specified in Section 3 of the Act, in ports

under jurisdiction of the United States. Among the conditions so authorized to be prescribed was an undertaking "with respect to * * * the fair and reasonable maximum rate of charter hire or equivalent." The policy required to be followed by the Commission in the administration of the Act was "to make fair and reasonable provision for priorities with respect to" the importation and transportation of substantial quantities of materials described in Section 4 of the Act.

When the Ship Warrants Bill [H. R. 4700], was reported favorably to the House on May 12, 1941, by the Committee on the Merchant Marine and Fisheries, the Committee report stated, in part:

> The legislation does not contemplate governmental prescription of rates now agreed to by conferences, but would accord a measure of control over shipping by means of a commercial bargain with vessel owners and charterers.

When the Ship Warrants Bill was before the Senate Committee on Commerce, the Maritime Commission submitted to the Committee a written statement containing the following representation:

> *Conclusion.*—The bill is designed and will be administered only as priorities legislation, a regulatory plan for which there is ample legislative precedent and which will meet a vital need of our defense and our domestic economy.
>
> The bill does not authorize nor will it be administered as a direct or indirect means of taking property or putting it to a public use without just compensation.

The schedules of rates of charter hire and other conditions prescribed by the Maritime Commission or its successor from time to time, as hereinafter set forth, in the course of administering the Ship Warrants Act were incor-

porated in written "Uniform Conditions." A ship warrant would not be issued to an applicant who did not undertake to observe such "Uniform Conditions."

Although plaintiff did apply to the Commission on September 25, 1941, and on October 3, 1941, for ship warrants for its vessels, plaintiff did not incorporate in its application an undertaking to observe the "Uniform Conditions." The Commission declined to issue warrants and returned the application to the plaintiff.

26. The measures taken by the United States Maritime Commission or its successor, War Shipping Administration, in the course of administering the Ship Warrants Act of July 14, 1941, included the following:

(a) On July 30, 1941, in Press Release 970, the Commission issued "a scale of maximum time charter rates for United States and foreign flag vessels in which the Commission will concur for charters in which their concurrence is indicated on and after August 1, 1941."

Such scale provided for basic time charter hire at the rate of $4.50 per deadweight ton per month for steamships of 10,000 deadweight tons and up, with an additional 10¢ for each ½ knot of speed in excess of 12 knots. The basic rates for steamers of lesser deadweight tonnage were somewhat higher, the rate for a steamer of the *Hawaiian's* tonnage being $4.60 per deadweight ton per month. Such rates were admittedly about 35% below the existing time charter rate of $7.50 approved by the Commission. No change was made in berth rates.

No advance notice of the schedule was given to shipowners to be affected, nor was any prior or subsequent opportunity afforded to them for a public hearing or for presentation of evidence and argument in opposition. No findings whatever were made either that the schedule was in any way necessary or appropriate "to make fair and reasonable provision for priorities" with respect to the transportation of any of the materials specified in Section

4 of the Ship Warrants Act. No evidence was stated which would support such a finding or would tend to show that, either in order to give priority to such transportation or by another standard, it was "fair and reasonable," at a time when the demand for shipping was admittedly increasing, to prescribe maximum time charter rates more than one third below existing market rates theretofore approved by the Commission.

No witness was produced by defendant, in this suit, to testify concerning the basis on which the scale of rates prescribed in Press Release 970 was prepared by the Commission, but the record contains an uncontradicted admission to Congress by an official of the Commission that the prescribed time charter rate of $4.50 per deadweight ton per month "represented an arbitrary reduction of $3 per ton under what had been more or less considered a going rate prior to that time."

(b) The schedule of time charter rates contained in Press Release 970 formally became part of the ship warrants procedure by its incorporation into the "Uniform Conditions" issued in connection with the "Ship Warrants Rules and Regulations," dated August 14, 1941, and approved by the President, August 26, 1941, to become effective thirty days thereafter.

(c) On January 5, 1942, the Commission issued its Press Release 1117 making public the Commission's General Order No. 49, dated December 30, 1941, and to be effective January 20, 1942, reducing the maximum time charter rates which warrant-holding vessels were required to observe to levels about 28% below those in Press Release 970.

The new basic maximum time charter rate on steamers of 10,000 deadweight tons and up was $3.25 per deadweight ton per month, compared with the rate of $4.50 prescribed by Press Release 970. An additional 10¢ per deadweight ton per month was allowed for each knot of speed in excess of 10 knots up to 14 knots. For steamers of the *Hawaiian's* tonnage, the new basic maximum rate was $3.35 per dead-

weight ton per month, as compared with the previous maximum of $4.60. After speed adjustments, the new rate for a steamer like the *Hawaiian* would have been $3.55, as compared with the previous maximum rate of $4.60 under Press Release 970.

As in the case of Press Release 970, no advance notice or hearing was given to shipowners regarding Press Release 1117. Nor were any findings made or evidence indicated by the Commission tending to show why, a few weeks after Pearl Harbor and the consequent further increase in demand for and in the operating expenses of shipping, it had become "fair and reasonable" to reduce the maximum rates prescribed in July 1941 by Press Release 970 or why such a reduction was necessary or appropriate "to make fair and reasonable provision for priorities with respect to" the transportation of materials specified in Section 4 of the Ship Warrants Act.

No witness was produced by defendant to show how the new schedule was prepared.

(d) Berth rates and certain other rates charged by the operators of warrant-holding vessels were also required by General Order No. 49 and Press Release 1117 to be so adjusted as not to be "in excess of the charges for such service or arrangements in effect September 1, 1940 * * * plus such reasonable additional surcharge as may be approved by the Commission" to cover increases in operating expense subsequent to September 1, 1940, and such requirement was incorporated into the ship warrant procedure by means of revised "Uniform Conditions" issued January 13, 1942.

The Commission's order was not accompanied by any findings or statement of evidence to show why, in January, 1942, a "roll back" to berth rates existing on September 1, 1940, (except as modified by approved surcharges), had become "the fair and reasonable maximum rate of charter hire or equivalent".

No witness was called by defendant in this case to explain the selection of September 1, 1940, as the date to which berth rates, (before surcharges), were to be rolled back.

Surcharges on berth rates were, in fact, authorized by "rate orders" of the War Shipping Administration issued throughout the period 1942-46 until the Warrant Act Regulations were revoked in 1946.

The defendant did not offer any evidence to show the actual net effect of the "roll back" when considered together with the surcharges. Nor did defendant offer any evidence to show how, in fact, the levels of earnings of vessels requisitioned or owned by the War Shipping Administration and operated in foreign overseas berth trades, compared with prerequisition levels of earnings in those trades. The earnings of plaintiff's steamer *Utahan* while under requisition (See Finding No. 19), indicate a continuance of the prerequisition level of berth earnings in one trade, at least.

(e) At the request of the War Shipping Administration, the American Institute of Marine Underwriters and British Underwriters adopted a special provision called a "Ship Warrant Warranty," to be inserted in ship hull insurance policies issued on and after February 20, 1942, making the holding of a ship warrant a condition of the validity of the insurance.

(f) After February 2, 1943, "nonwarrant holding vessels" were forbidden to use a "facility" without special authorization obtained by application to the War Shipping Administration. Such special authorizations were issued infrequently. The effect was to prohibit such vessels from obtaining repairs, fuel, stevedoring and towage in United States ports, even though the furnishing of such services would not interfere with service to a warrant holding vessel.

Before the War Shipping Administration brought the "Ship Warrant Warranty" device into operation and, later,

denied all use of shore facilities to vessels not holding warrants, the Warrants Act had been ineffective to compel operators to obtain warrants merely because of the priority accorded to warrant-holding vessels in the use of shore facilities.

There is no other evidence in the record to explain why it was considered necessary or appropriate to deny insurance and essential services to nonwarrant holding vessels, instead of merely giving priority to warrant-holding vessels in the use of shore facilities as provided in Section 3 of the Ship Warrants Act.

(g) In addition to the above listed general administrative orders, specific instances appear in the record of coercive actions by the Maritime Commission.

Plaintiff was required to time charter vessels to the Commission during the last quarter of 1941 at rates of $4.50 to $4.60 per deadweight ton per month as prescribed in Press Release 970, although the plaintiff then had five of its vessels operating at rates of $7.00 per deadweight ton per month under time charters made in June 1941 to private operators.

At about the same time, States Marine Corporation was required to time charter two newly acquired vessels to the Commission at rates of hire about $2.00 per deadweight ton per month less than the hire under the last previous charters of the vessels to private operators.

Discriminatory action against shipowners operating in the domestic trades was taken in connection with the Warrant Act regulations and "uniform conditions". Operators of warrant-holding vessels engaged in the domestic trade were required to make their vessels available to berth operators in the foreign trade. Where such vessels were time-chartered by their owners to the berth operators, the owners received hire only at the depressed rates prescribed in Press Release 970 or Press Release 1117, whereas the berth operators would collect freights at the nondepressed berth rates.

On the other hand, vessels owned by the Commission and chartered to others, and vessels chartered by the Commission from others received warrants without the necessity of an undertaking by their operators to observe the schedules of rates prescribed in connection with the Warrants Act.

The Commission also required vessels to engage in and to accept reduced rates for transportation having no apparent connection with the movement of materials specified in Section 4 of the Ship Warrants Act.

27. Prior to the general requisitioning in April 1942, many shipowners protested against the schedules of rates prescribed for warrant-holding vessels. There were no unqualified acceptances of the P. R. 1117 scale of rates. As a result, readjustments were allowed by the War Shipping Administration by means of "escalator clauses" and by giving the subsequent time charter requisition rates retroactive effect to January 20, 1942.

After the general requisitioning in April 1942, the [illegible]te schedules issued in connection with the Warrants Act became largely academic to American shipowners because their vessels then ceased to be operated for their account and any profits or losses resulting from operations under the prescribed rates were for account of the War Shipping Administration.

28. Following the general requisition on time charter basis in April 1942, the War Shipping Administration on May 14, 1942, issued its General Order No. 8, establishing a scale of requisition time charter rates at amounts intermediate between those in the Maritime Commission's Press Release 970 of July 30, 1941, and those in the Commission's Press Release 1117 effective January 20, 1942. The new scale was made retroactive to January 20, 1942.

Under the General Order 8 scale, steamers of 10,000 deadweight tons and up received time charter hire at $3.75 per deadweight ton per month on sailings prior to May 16, 1942, and at $4 on sailings on and after May 16, 1942. Under

Press Release 970 the basic rate for such vessels was $4.50 (see Finding 26a), whereas, under Press Release 1117, the rate was $3.25 (see Finding 26c).

Steamers of the *Hawaiian's* tonnage were allowed, under General Order 8, a basic rate of $3.90 on sailings prior to May 16th and $4.15 on later sailings.

29. Before issuing General Order No. 8 on May 14, 1942, the War Shipping Administration made an investigation of the average cost of operating various classes of vessels built before 1937 and prepared a proposed scale of requisition time charter rates for such vessels. In connection with its investigation, the War Shipping Administration had required owners to submit reports showing the financial results of some 597 voyages terminating in the last quarter of 1941 or early in 1942.

The rates in the proposed scale were the sum of two components: (a) a so-called "bareboat" factor of $1.00 per deadweight ton per month (with certain speed premiums and an "off-hire" allowance of 10%) was proposed as "an acceptable rate" for the bare use of requisitioned vessels; and (b) a factor to represent the average of shipowners' costs under the proposed form of requisition time charter, together with an allowance for owner's "overhead."

(a) Admittedly, the proposed "bareboat" component of $1.00 per deadweight ton per month, was not based on any approximation of the earnings then being realized by shipowners from commercial employment of their vessels, although full information about such earnings was available from owners' voyage reports mentioned above and from the Administration's own studies in Defendant's Exhibit 17. The former Director of Fiscal affairs of the War Shipping Administration expressly admitted that the requisition rates had no relation whatever to the earning power or the value of the use of the requisitioned vessels. He said: "we got together a lot of information and we

thought that the best way to fix the rate was to fix it on as low a basis as we possibly could. * * * We know that in 1941 the ships were earning quite a lot of money, and that the rates that were published in General Order No. 8 were nowhere near as high as the earnings the companies were making in 1941."

(b) The expense factor in the proposed rates was compiled from statistics on the average vessel expense for crew's wages, subsistence of crew, stores, supplies, equipment, repairs, other vessel maintenance expense and insurance and from statistics on the average overhead expenses of 16 shipping companies for the year 1940. The resulting figures were weighted for certain known or anticipated increases in costs and for periods of "off hire."

The principal study of actual vessel expense related to 60 voyages terminating in the last quarter of 1941 by freighters over 20 years old and having from 8,000 to 8,999 tons deadweight capacity.

Admittedly, as the expense factor assumed was a mathematical average, some owners were sure to receive more than the so-called "bareboat" factor as compensation for the use of their vessels on a time charter basis and some owners would receive less.

The vessel expenses and overhead shown by the studies fluctuated so widely and would, therefore, cause such wide variations in compensation to owners under a time form operation that the Director of Fiscal Affairs recommended that the Administration substitute a bareboat basis of operation, but the recommendation was not followed at that time. In 1943, however, a general requisition on bareboat basis occurred. (See Finding No. 31.)

To determine the proposed rates for vessels in tonnage classes below and above the 8,000-8,999 ton class, additions or subtractions were made to adjust for assumed differences in average vessel operating costs on a deadweight ton basis.

With respect to overhead, the study showed variations similar to the variations in vessel expense. Admittedly, much of the overhead expense covered by the study was unnecessary for the performance of the mere vessel "husbanding" required under a time charter form of operation.

30. The proposed scale of requisition time charter rates referred to in Finding No. 29 was then discussed at a meeting held May 9th-11th, between representatives of the War Shipping Administration and an invited group of officials (for convenience, hereinafter called the "owner group"), representing about a dozen shipping companies, seven of which were holders of operating differential subsidy contracts with the Maritime Commission and two were subsidiaries of steel companies. The proposed scale was not given to the owner group before the meeting.

Altogether there were nearly 200 American companies owning vessels of 1,000 gross tons or more (not including tankers), whose use or title was requisitioned.

At the meeting, the Director of Fiscal Affairs told the owner group that if there were not general acceptance of "a rate that I thought was low enough," he would recommend requisition of title to their vessels.

The owner group declined to discuss rates composed of stated component parts and that feature of the proposed rates was eventually dropped, but owners' costs under time charter form of operation of freighters in the 8,000-8,999-ton class were discussed between a subcommittee of the owner group and the Comptroller of War Shipping Administration and various adjustments were made to bring the total proposed rate to $4.10 for freighters in the 8,000-8,999-ton class on sailings after May 16, 1942.

Finally, after some of the owner group had said they would recommend acceptance if 25 cents per deadweight ton per month were added to bring the rate as a whole to $4.35, such addition was made. No clear explanation was given of the calculation of the rates of hire applying to

vessels having tonnages greater or less than those in the 8,000-8,999-ton group.

Plaintiff's representative stated that plaintiff probably would not accept.

One of the owner group definitely declined to accept and his vessels were requisitioned for title. There were admittedly disputes about the rates with other owners and their ships were either requisitioned for title or for use on bareboat basis.

A diversity existed in the owner group in respect of financial considerations weighing for or against acceptance of the proposed rates. Owners having operating differential subsidy contracts received certain tax exemptions on their profits. Others had special agreements with the Treasury Department for accelerated depreciation. In other cases, acceptance was necessary, as the only alternative to litigation, in order to obtain reimbursement for expenses incurred from operating vessels on requisition status or on unexecuted time charter status from dates as far back as January 1942. In plaintiff's case, such unreimbursed outlays amounted to about $2,000,000 at the time when the requisition time charter rates were tendered for acceptance.

It is true that defendant claims a widespread acceptance of its rates under the requisition time charters initiated in April 1942, as evidence of which it has introduced its Exhibits 8 and 8A, which contain a list of some 390 vessels belonging to 79 owners, for which requisition time charters were signed by the owners. Not only does said list fail to show that such charters were signed by all affected owners, but their signing is in reality not evidence of their consent to or approval of the rates of hire.

In a requisition on a time charter basis the Government requisitioned much more than the ship itself. It requisitioned the service of the owner and the outlay by the owner of money in order to discharge such owner's obligations under the time form charter. In order to obtain funds with which to defray outlays, many ship owners, as in the case

of the plaintiff, were forced to sign the charters. Moreover, it has been shown that many of such charters were not signed until a much later date, in connection with other settlements by transfer of title or otherwise.

31. In November 1942, a dispute occurred between the Comptroller General of the United States and the Administrator, War Shipping Administration, regarding the application of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act, 1936, to the determination of just compensation for requisitioned vessels. As a result of a notice issued December 17, 1942, the Administrator commenced to withhold 25% of the hire payable under the terms of the requisition time charters. Thereafter, the *Hawaiian* was requisitioned on bareboat basis (See Finding No. 1), and similar requisitions of plaintiff's other vessels followed.

On October 15, 1943, the President appointed an Advisory Board on Just Compensation, which on December 7, 1943, rendered a report of its views on the principles which should be followed by the Administrator in determining just compensation.

Meanwhile, by notices dated October 15, 1943, November 1, 1943, and November 24, 1943, the Administrator instituted a "Revised Program of Ship Requisition, Charter and Operation," which, in effect, provided for termination of the requisition time charters then remaining in force and for a general requisition on bareboat basis. Exception was made for cases where owners might elect to remain on time charter basis but with a revised form of charter and at revised rates.

Thereafter, the compensation offered by the War Shipping Administration for the use of vessels requisitioned on bareboat basis was fixed by General Order No. 37, issued on April 7, 1944.

32. The basic rate of bareboat charter hire provided by General Order No. 37 for all dry cargo vessels built during the period 1914-34, was $1.25 per deadweight ton per month. That was the same as the "bareboat" component of $1.00 per deadweight ton per month originally proposed by the

War Shipping Administration in May 1942 (see Finding 29a), combined with the additional allowance of 25¢ per deadweight ton per month made as a result of discussion with the owner group immediately prior to the issuance of General Order No. 8 on May 14, 1942. (See Finding 30.)

In a memorandum submitted on April 15, 1944, to the House Committee on the Merchant Marine and Fisheries, the Administrator, War Shipping Administration, stated that "the proposed basic rates of General Order 37 are:

(1) Below actual earnings of 1940 and not greatly in excess of earnings of 1939;

(2) Only about 40 percent of the rate recently fixed by the court in the *Olson* case;

(3) Only about 40 percent of the bareboat rates paid by the Army and Navy in 1941;

(4) Less than one-third of the rate fixed administratively in the first war;

(5) About one-third of the actual earnings of 1941;

(6) About one-fifth of the rates allowed by the courts in the first war; and

(7) Less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941.

General Order No. 37 was prepared by the Division of Large Vessel Procurement of the War Shipping Administration under the supervision of the Assistant Deputy Administrator for Fiscal Affairs. None of the Administration staff responsible for preparation of the order, including the "findings" contained in it directly or by reference, had had experience as a shipowner, operator or broker. No hearings were held in connection with the determination of the bareboat rates, notwithstanding a written request for such a hearing submitted on December 31, 1943, by the Association of American Ship Owners, of which plaintiff was a member, and, in fact, the terms of the order were kept confidential prior to its issuance.

The principal preliminary "findings" in connection with determination of the rate of hire for freighters built prior to 1935 were that no market existed at the time of the bareboat requisitions and that the value of the use should be determined in accordance with the Advisory Board's Rule 3 which stated the factors to be considered and the method to be followed in determining probable market value in situations where there is no actual market.

The method actually used by the W. S. A. staff was to concentrate on two "factors" each of which, they found, showed that an amount of about $1.25 per deadweight ton per month would be just compensation for bareboat use. The two "factors" were:

(a) The average amount of "adjusted earnings under current charters," (i. e. under the requisition time charters); and, alternatively,

(b) A sum sufficient to provide for (i) annual "depreciation" on the valuation of the vessels, and (ii) "a reasonable rate of return" on such valuation.

Further facts regarding those two alternative factors and the subsidiary "findings" of the War Shipping Administration staff in connection with those factors, are stated in Findings 33, 34, and 35.

In substance, however, the general procedure was to derive compensation for bareboat use from the rates of hire and war risk insurance valuations fixed by the Administration itself in General Orders Nos. 8 and 9 issued in May 1942, in connection with the general requisition on time charter basis in April 1942.

The procedure in connection with the first "factor" consisted of applying arbitrary "adjustments" to average earnings of requisitioned vessels obtained from charter hire at General Order No. 8 rates.

The procedure in connection with the second "factor" consisted in applying an arbitrary rate of "depreciation" to the average war risk insurance valuation fixed in General Order No. 9 and then applying an arbitrary "rate of return" to such depreciated valuation.

The ultimate result of those procedures was the further arbitrary conclusion that compensation for bareboat use under General Order No. 37 should be the same amount as the Administration had intended to allow as the "bareboat factor" of compensation under General Order No. 8.

33. In connection with the first factor, the staff found that the "adjusted earnings" of the average dry-cargo vessel built prior to 1935 had amounted to $1.275 per deadweight ton per month under the requisition time charters.

This procedure of using as evidence of just compensation for use under the bareboat requisitions the "adjusted earnings" under the scale of rates fixed by the Administration on its prior requisition on time charter basis, was explained on the ground that the requisition time charters were the only "hirings" immediately before the general bareboat requisitioning.

No effect was given to the earnings which requisitioned vessels had realized for their owners immediately prior to defendant's taking of the vessels in April 1942, the reason given for such omission being, in substance, that such earnings were considered to be no longer available to private shipowners. In fact, as shown by the evidence summarized in Findings 18-21, such earnings could have been realized by private shipowners throughout the requisition period if the vessels had remained free of requisition.

The earnings then actually being realized for the defendant by the same owners as agents for the War Shipping Administration from the use of the same vessels for carriage of nonmilitary cargo were also admittedly disregarded, the explanation being that such earnings had not been segregated from the general results of all cargo operations and the staff was too busy to compile the data. This explanation seems irreconciable with the fact that income from carriage of commercial and lend-lease cargo was segregated in budgetary statements submitted to Congress by the War Shipping Administration. (See Finding 19.) Also, the explanation is irreconcilable with the fact that the staff had taken time to segregate and compile data on the

revenue and expense of the shipowners' operations under the requisition time charters.

Apart from the foregoing considerations showing the immateriality of the statement of "adjusted earnings" under the requisition time charters, the evidentiary value of the statement itself is affected by the following circumstances. It was prepared by persons not called as witnesses, was based on data not made available at the hearings, and consisted, in part, of deductions of estimated amounts for "deferred repairs," and "allowance for risks" and "overhead" which defendant's witness on the subject was unable to substantiate and which, in fact, had no material application to the *Hawaiian.*

A comparison of the actual audited figures of the plaintiff and of States Marine Corporation for all their operations under the requisition time charters, and the War Shipping Administration figures shows the following result:

Comparison of W. S. A. estimate of "adjusted earnings" under requisition time charters with actual earnings of plaintiff and of States Marine Corporation

Items		W. S. A. estimate (Def. Ex. 19B)	Plaintiff (Pl. Ex. 68)	States Marine (Pl. Ex. 73)
1. Actual charter hire		$4.098		
2. Allowance for accrued off hire		.066		
3. Adjusted charter hire		4.032	$3.96	$4.30
4. Reported operating costs	$1.882			
5. Allowance for deferred repairs	.215			
6. Allowance for risks	.250			
7. Adjusted operating costs		2.347	1.89	*1.93
8. Adjusted earnings before overhead		1.685	2.07	2.37
9. Allowance for overhead		.41	**.17	†0
10. Adjusted earnings		1.275	1.90	#2.37

* Includes $45,343.71 of disputed items of expense equivalent to $0.09 per deadweight ton per month.

** At $60 per day, being the husbanding fee allowed by the W. S. A. to General Agents.

† Husbanding expense is included in operating costs. (*McGrath*, p. 1898.)

The actual figure in Plaintiff's Exhibit 73 is $2.40. The figure of $2.37 appearing in the above table is derived from use of months of 30 days each for convenience in calculating the number of "deadweight ton months."

The foregoing table further demonstrates the unreasonableness of the defendant's use of "adjusted earnings" of all freighters under the requisition time charters as a basis for determination of just compensation for the use of plaintiff's vessels under bareboat requisition.

34. In connection with the second alternative "factor" claimed to support the rate of $1.25, three subsidiary "findings" were made by the War Shipping Administration staff:

(a) That the average valuation of requisitioned dry-cargo freighters built prior to 1935 amounted to $75 per deadweight ton as of April 1942 when the general requisitioning on time charter basis had occurred;

(b) That the average anticipated remaining life of such vessels after April 1942 was eight years and their consequent annual rate of "depreciation" was 12½%.

(c) That annual hire at the rate of $15 per deadweight ton (equivalent to $1.25 per deadweight ton per month), would provide both: (i) "a reasonable rate of return" of $5.625, representing 10% of $56.25, the average depreciated valuation of the vessels per deadweight ton as of April 1944; and also, (ii) $9.375, representing the amount of annual depreciation on the average value of $75 (as of April 1942), at the annual rate of 12½%.

(a) The subsidiary finding that requisitioned freighters built prior to 1935 all had a value of $75 per deadweight ton in April 1942, was made merely as a premise of the subsequent finding (c), that the depreciated value of such freighters in April 1944 was $56.25 per deadweight ton.

No factual justification appeared for lumping all such vessels together and assigning them the same valuation. On the contrary, the Administration's Division of Statistics and Research found, in respect of the sales and appraisal

data studied covering dry cargo vessels of 7,000 to 12,000 tons deadweight, that:

> Any trends or central tendencies noted in this study are qualified by the fact that the number of dry cargo vessels and tankers under consideration is small, probably too small for statistical analysis. Furthermore, vessels of the size included here are quite individualistic in character and would show a high degree of dispersion from any median or average. The best that the data have to offer are some suggestions and tentative conclusions.

Eight "elements" were stated to have been considered in arriving at the April 1942 valuation finding. Of these, two relating to depreciated construction cost were admittedly of small significance. The significance of an "element" consisting of two private sales occurring in January and February, 1941, and another "element" consisting of a "peak sale" also in 1941, was unexplained. It was also admitted that no weight was given to the "element" of average sales in 1941 from the government's laid-up fleet. Except for three appraisals in 1943, the "element" of appraisal data consisted of some 18 appraisals in March, April, and May 1942, of which 15 were by the Maritime Commission itself.

The final and controlling "element" consisted of "values under current charters" and the figure of $75 per deadweight ton shown by this "element" was the one actually adopted. In fact, that figure was nothing more than the valuation which the assumed average vessel would have under the scale fixed by the War Shipping Administration itself in General Order No. 9 for purposes of war risk insurance under the requisition time charters.

The foregoing is not substantial evidence of the value which all requisitioned dry cargo vessels built before 1935 had in April 1942.

There was no evidence whatever to show the valuation of the vessels at the times of their takings under the gen-

eral bareboat requisition or as of April 1944 when General Order No. 37 was issued. Nor was there any evidence to show to what extent, if any, valuations made as of April 1942, even if fair and reasonable, were relevant to determinations of value in April 1944.

(b) The second subsidiary finding above mentioned, that, because of assumed obsolescence, such vessels had only an eight year remaining life and a consequent annual depreciation of 12½% commencing in April 1942, was admittedly unsubstantiated by any facts submitted in evidence at the trial.

It was admitted that the rate of 12½% per year was inconsistent with the appraisal data and the sales data. It was also admitted that the age-spread of twenty years in the vessels under consideration had been disregarded for purposes of determining depreciation.

As of April 1952, all ten of plaintiff's vessels which had been redelivered from bareboat requisition in 1946 were still in commercial operation, with the exception of one which had been lost. These vessels had been built at various dates between 1912 and 1921.

At a hearing on May 6, 1947, an official of the Maritime Commission stated that old vessels were bringing $80 to $90 per ton right after V-J Day.

(c) The third subsidiary finding, that a 10% rate on the assumed valuation of the vessels as of April 1944 was a "reasonable rate of return," is unsupported by any evidence whatever and admittedly was only the opinion of the War Shipping Administration's staff "of what public opinion would consider a reasonable rate of return."

It was further admitted that no rule of the Advisory Board authorized the use of public opinion as a criterion for determining just compensation.

The portion of the same subsidiary finding to the effect that the hire should include the assumed annual rate of depreciation at 12½% was likewise unsupported by any

commercial practice or other substantial evidence and was not shown to have any connection with the earning power or value of the use of the requisitioned vessels.

35. There was not any subsidiary finding by the Administrator nor any substantial evidence to show that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire the *Hawaiian*, or a similar vessel, on or about July 7, 1943, or at any other time during her requisition period.

36. In their respective views of the issues the parties have not reached the question of deductible enhancement in any specific way. It is presumed that plaintiff was not interested in establishing offsets to the nearest free market values. The defendant's values admittedly represent a substantial roll back from the latest free market, and there is no claim that they include any deductible enhancement.

However, the evidence of the circumstances and factors from which the Court can weigh the influence upon the nearest free market of the need, or prospective need for ships of the type of the *Hawaiian* is in the record, or such circumstances and factors are matters of common knowledge, of which the Court may take judicial notice.

It is believed that the proportion of deductible enhancement existing could never be susceptible of exact mathematical measurement, and must necessarily be determined upon a consideration and evaluation of the factors bearing thereon. Taking all these matters into consideration, bearing in mind the world and home market before and during this country's participation in the war, and giving weight to the progressive preoccupation of this country with steps looking toward participation in the war, the conclusion is reached that a bareboat rate of not less than $3.00 per month per deadweight ton for the *Hawaiian*, during the period of bareboat requisition, would constitute just compensation, and would not include any enhancement due to the Govern-

ment's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking reasonably probable.

Respectfully submitted.

CURRELL VANCE,
Commissioner.

ARGUMENT AND SUBMISSION OF CASE.

On April 6, 1954, the case was argued and submitted on the merits by Mr. Clement C. Rinehart for the plaintiff and by Mr. J. Frank Staley for the defendant.

OPINION OF THE COURT BY WHITAKER, JUDGE, FINDINGS OF FACT AND CONCLUSION OF LAW.

(Decided October 5, 1954.)

MR. CLEMENT C. RINEHART for plaintiff. Messrs. CARL H. WATSON, JR., and KIRLIN, CAMPBELL & KEATING, were on the briefs.

MR. J. FRANK STALEY, with whom was MR. ASSISTANT ATTORNEY GENERAL WARREN E. BURGER, for defendant. MR. WILLIAM A. MELLAN was on the brief.

OPINION.

WHITAKER, Judge, delivered the opinion of the court:

The issue presented in this case is the just compensation to which the plaintiff is entitled for the taking by defendant under a bareboat charter, of the possession and use of the American steamship *Hawaiian* during the period from July 7, 1943, to May 1, 1946.

Plaintiff says that it is entitled to a rate of $6.00 per deadweight ton per month throughout the requisition period less the amounts already paid by defendant on account, plus interest, as a part of just compensation, at the rate of 4

percent per annum on each monthly installment beginning August 1, 1943, and continuing to the date of payment of the judgment herein, subject to certain adjustments.

Defendant says that the "bareboat requisition rate" should not exceed that fixed by the War Shipping Administration, which was $1.25 per deadweight ton per month, plus appropriate allowances for the *Hawaiian's* deadweight tonnage and speed.

The *Hawaiian* was a steam freighter built in 1919, of 9,460 deadweight tons, and with a speed in excess of 12 knots. Her particulars are further described in finding 4.

On July 7, 1943, the War Shipping Administration, acting pursuant to section 902 (a) of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U. S. C. §1242, requisitioned the *Hawaiian* on a "bareboat" basis. It retained possession and use of the vessel until it was redelivered to plaintiff on May 1, 1946.

On July 31, 1944, approximately a year after the requisition, the War Shipping Administration tendered plaintiff a bareboat form of charter party for the *Hawaiian* containing, *inter alia*, an offer of hire at the rate of $12,108.80 per calendar month. This was at the rate provided by War Shipping Administration General Order No. 37, issued April 7, 1944, which fixed a basic rate of bareboat charter hire for dry cargo vessels built during the period 1914—1934 at $1.25 per deadweight ton per month, plus certain allowances for vessels having speeds equal to or in excess of 10½ knots. The hire tendered for the *Hawaiian* was at the rate of 1.28 per deadweight ton per month, the sum of the basis rate established by General Order No. 37, plus an additional 3 cents allowed for vessels with speeds exceeding 10½ but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots, she was entitled under General Order No. 37 to 6 cents, instead of 3 cents, in addition to the basic rate of $1.25 per deadweight ton per month.

On August 24, 1944, plaintiff declined to accept either the form of charter or the rate of hire offered. As required

by section 902 (d) of the Merchant Marine Act of 1936, *supra,* defendant made monthly payments to plaintiff, between March 24, 1944, and August 16, 1946, aggregating $307,079.74 for the use of the *Hawaiian.* The aggregate amount of these payments on account is equivalent to hire at the rate of 96 cents per deadweight ton per month for the bereboat requisition period, or 75 per cent of hire at the rate of $1.28 per deadweight ton per month.

Plaintiff sues to recover hire at the rate of $6.00 per deadweight ton per month, less the amount already received by plaintiff on account, or net compensation of $5.04 per deadweight ton per month for the bareboat requisition period of 33 months, 25 days, 5 hours, and 10 minutes, plus interest as a part of just compensation for defendant's delay in payment.

In determining what is just compensation, each case must be decided upon its individual facts, although the courts are guided to their conclusions by certain broad principles, well known, often quoted, and often difficult of application in specific instances. *Dore* v. *United States,* 119 C. Cls. 560, 581. Just compensation has been defined as "the sum which, considering all the circumstances—uncertainties of the war and the rest—* * * * would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123-124; *Olson* v. *United States,* 292 U. S. 246, 257. This is but another way of saying that fair market value, where there is a free market, is the usual standard of just compensation. *United States* v. *Commodities Trading Corp.,* 339 U. S. 121, 123; *Olson* v. *United States, supra,* p. 255; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326; *Boom Company* v. *Patterson,* 98 U. S. 403, 407. Where, for any reason, property has no market, resort must be had to other data to ascertain its value, although this "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with

nicety." *United States* v. *Miller*, 317 U. S. 369, 374. The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a "reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases*, 230 U. S. 352, 434." *Standard Oil Co. of New Jersey* v. *Southern Pacific Co.*, 268 U. S. 146, 156.

There was no free market for the use of large, ocean-going, American-flag freighters such as the *Hawaiian* at the time of her taking on bareboat basis on July 7, 1943. In April 1942, the use of all such privately owned vessels had been requisitioned on time charter basis by the War Shipping Administration. From that time, if not before, there was no free market for the use of the *Hawaiian*. The court must, therefore, base its determination on other data, even though the inquiry may involve what is "at best, a guess by informed persons." *United States* v. *Miller, supra*, p. 375.

The requirement of the Constitution is that the Government must pay for property it takes a compensation which is "just." By that is meant, of course, what is just to the owner and to the Government. Justice is no absolute term. It frequently requires give and take. For one to demand all that the law allows may do injustice to the other. Shylock, in Shakespeare's *Merchant of Venice*, was entitled under the law to his pound of flesh, but, as we see it today, it would have been an injustice for him to have taken it. Justice is a nice balance of the equities.

This was not so under the old common law of England; but equity intervened to ameliorate the rigors of the law. When our Constitution was adopted, and today, justice means the law tempered by the principles of equity.

Plaintiff says that the level of earnings realized by owners from the use of freighters such as the *Hawaiian* from the carriage of commercial cargo some months prior to the general requisitioning in April 1942 could have been realized by plaintiff throughout the bareboat requisition

period if the *Hawaiian* had not been taken by defendant, but had remained in plaintiff's possession and control.

This is unrealistic. The country was at war. Various and sundry controls had been established that affected the use of plaintiff's vessel. Controls authorized by statute are necessary for the defense of the nation and are lawful, unless they are in conflict with the Constitution. Conditions when the boat was requisitioned were radically different from those existing before the war. What the boat earned before the war is no measure of what she could have earned during the war.

Just compensation for the use of the *Hawaiian* is not to be measured by the value of her use before the market was "interfered with" by the Government, as plaintiff says. In arriving at the amount which probably would have resulted from fair negotiations between an owner willing to let, and a charterer desiring to hire the *Hawaiian*, lawful governmental regulations, restrictions, and controls cannot be ignored. *American-Hawaiian Steamship Company* v. *United States*, 85 F. Supp. 815, aff'd. 191 F. 2d 26, cert. den. 342 U. S. 941; cf. *Smith-Douglass Co., Inc.* v. *United States*, 126 C. Cls. 758, 763. Any just and equitable valuation, fairly reflecting a consideration of all relevant facts, must of necessity take into consideration all of the conditions then existing, including lawful legislative and administrative restrictions on the use of the property valued.

But we are, of course, aware that the constitutional requirements that the Government must pay just compensation for what it takes is one which war does not suspend, alter, or modify. *United States* v. *New River Colleries*, 262 U. S. 341, 343; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81. The principles to be applied by the courts do not vary, whether the power to take be exercised in time of war or in time of peace.

Defendant contends that the bareboat requisition rate should not exceed the basic rate allowed by General Order No. 37 of $1.25 per deadweight ton per month, plus appropriate allowances for speed.

Defendant's position is also untenable. In the first place, this rate is not binding on the courts. Especially in a case where the rate fixed is not one applicable between private parties, but only as between the Government, who is the taker, and the owner, whose property is taken, a rate fixed by the Government should not be conclusive. The ascertainment of just compensation is not an administrative but a judicial function; no power exists in any administrative agency of the Government to declare what that compensation should be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States, supra,* p. 327; *Gulf Refining Co.* v. *United States,* 58 C. Cls. 559, 576.

While mindful of the complexity of the task confronting the War Shipping Administration, we are of the opinion that any method aimed, as was that of the War Shipping Administration, at the establishment of a rate applicable to all of a large class of dry cargo vessels, is "plainly inaccurate" when applied to any particular vessel. *Gulf Refining Co.* v. *United States, supra,* p. 577. There can be no presumption as to the correctness or the fairness of a rate made applicable indiscriminately to all vessels of a certain class. Although it may be impracticable, from the Government's standpoint, to determine just compensation for each particular vessel, the right to a judicial determination, if the owner is dissatisfied with the compensation determined for his vessel, is guaranteed by the Merchant Marine Act and by the Fifth Amendment. This court, while giving weight to the administrative determination, must nonetheless determine from the facts proven what it thinks is just compensation. *Borland* v. *United States,* 57 C. Cls. 411, 415.

We do not mean to imply that the basic rate established by the War Shipping Administration might not, under appropriate circumstances, be coterminous with just compensation for a particular vessel; but we must conclude on the record before us that the bareboat requisition rate fixed

by defendant as the yardstick to measure just compensation for all vessels of the *Hawaiian's* class is not "just" in her case.

Plaintiff's vessels were used in the intercoastal trade prior to the outbreak of war in Europe in 1939. The testimony discloses earnings for the last quarter of 1939, the last quarter of 1940, and the last quarter of 1941. For these three periods they were $1.29, $2.23, and $3.27 per deadweight ton per month, respectively. On voyages in foreign trade, commencing in 1941 and terminating in 1941 or 1942, including voyages under time charter with the maritime Commission, plaintiff's profits, before overhead, depreciation and taxes, were $4.19 per deadweight ton per month. Exclusive of such voyages under time charter with the Maritime Commission, its profits were $5.13 per deadweight ton per month, before overhead, depreciation, and taxes.

On the other hand, the War Shipping Administration had fixed a rate for time charters of vessels such as the *Hawaiian* at a basic rate after May 1942 of $4.15 per deadweight ton per month, which had been agreed to by the owners, including plaintiff, reluctantly, it is true, and after threat of requisition of title by the War Shipping Administration, but nevertheless agreed to. Applied to the *Hawaiian* this would have amounted to $4.35 on a time charter. As near as we can tell from the testimony, plaintiff's average cost of operation of its vessels under requisition time charters, exclusive of overhead, depreciation, and taxes, was $1.89 per deadweight ton per month.[1] This leaves $2.46. Plaintiff accepted this, although under some compulsion. It cannot be denied, however, that the War Shipping Administration "beat the owners down" as much as they could in establishing a rate of hire.

Prior to requisition on a time charter basis, in April 1942, plaintiff had of course been making high profits. But,

[1] Apparently plaintiff's overhead continued even after requisition on a time charter basis.

even in the absence of restrictions, war conditions would no doubt have reduced these profits; except for the restrictions, they would no doubt have been considerably in excess of the figure of $2.46.

Plaintiff's vessel was old. Its useful life was short. This, of course, affects the rate to be paid.

None of the things we have mentioned give any satisfactory basis for fixing just compensation, but taking everything into consideration, among others the general characteristics of the vessel, her physical condition, her age, her earnings before requisition on a time charter basis and afterwards, the demand for and supply of shipping space, legislative and administrative restrictions, and the uncertainties of the war, we have concluded that $2.50 a deadweight ton per month is "just" both to the owner and the Government.

We do not need to discuss deductible enhancement. The restrictions imposed more than offset any enhancement due to the causes that necessitated the taking. *Smith-Douglas Co., Inc.*, v. *United States,* 126 C. Cls. 758, 767.

Plaintiff is entitled to recover from the defendant hire at the rate of $2.50 per deadweight ton per month, less the amounts paid by defendant on account. In addition, plaintiff is entitled to recover interest, not as interest but as a part of just compensation, at the rate of 4 percent per annum on the unpaid balance of each monthly installment, beginning August 1, 1943, and continuing to the payment of the judgment herein.

Entry of judgment is suspended pending the incoming of a stipulation by the parties showing the amount due, computed in accordance with this opinion. In the absence of such a stipulation within a reasonable time, the case will be remanded to a Commissioner for a report showing the amount due, computed in accordance with this opinion.

It is so ordered.

MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

LARAMORE, Judge, took no part in the consideration or decision of this case.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner Currell Vance, and the briefs and argument of counsel, makes findings of fact as follows:

1. At all times relevant to this case, the American steamship *Hawaiian* was wholly owned by the plaintiff, American-Hawaiian Steamship Company, a New Jersey corporation, organized in 1899. On July 7, 1943, at 6:50 p. m., the defendant, acting through the War Shipping Administration, took the possession and use of the *Hawaiian* at Baltimore, Maryland, on "bareboat basis." The taking was by requisition under authority of Section 902 (a) of the Merchant Marine Act, 1936, as amended. Possession and use of the vessel by the War Shipping Administration under such requisition continued until she was redelivered to the plaintiff at Richmond, California, on May 1, 1946, at 12:00 midnight.

2. By letter dated July 31, 1944, the War Shipping Administration tendered plaintiff a demise or "bareboat" form of charter party describing the *Hawaiian* as having 9,460 tons deadweight capacity and setting forth proposed terms of the use of the *Hawaiian* during the bareboat requisition period, including an offer to hire at the rate of $12,108.80 per calendar month. The terms of the charter tendered were those prescribed by War Shipping Administration General Order No. 13, Supplement 1, issued April 7, 1944. The hire offered was specified in War Shipping Administration General Order No. 37, also issued April 7, 1944, "to establish * * * rate of charter hire for self-propelled ocean-going iron and steel vessels * * * requisitioned for use pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended * * *." Under General Order No. 37, the rate of bareboat hire for dry

cargo vessels built during the period 1914-1934 was $1.25 per deadweight ton per month, with certain additional allowances for vessels having speeds equal to or in excess of 11 knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, being the sum of $1.25 and an additional $0.03 provided for vessels having speeds equal to or exceeding 11 knots but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots (see finding No. 4), she was entitled under General Order No. 37 to $0.06 instead of $0.03 in addition to the basic $1.25 per deadweight ton per month.

3. On August 24, 1944, plaintiff wrote the War Shipping Administration declining to accept either the form of charter or the rate of hire offered. As required by Section 902 (d) of the Merchant Marine Act, 1936, as amended, defendant made, between March 24, 1944, and August 16, 1946, monthly payments to plaintiff aggregating $307,079.74, on account of just compensation for the use of the *Hawaiian*. The aggregate amount of such payments on account was equivalent to hire at the monthly rate of $9,081.60 or 96¢ per deadweight ton for the bareboat requisition period of 33 months, 25 days, 5 hours and 10 minutes and was also equivalent to 75% of hire at the rate of $1.28 per deadweight ton per month, tendered by defendant on July 31, 1944.

Thereafter, plaintiff brought this suit to recover, as just compensation for the use of the *Hawaiian*, hire at the rate of $6.00 per deadweight ton per month, less the hire which the defendant has already paid on account at the rate of 96¢, the net compensation claimed being equivalent to $5.04 per deadweight ton per month. In addition, plaintiff also claims compensation for defendant's delays in payment.

Settlement has been made of the claims of plaintiff and defendant, respectively, for consumable stores and fuel aboard the vessel when the requisition period began and ended and also of plaintiff's claims for reconditioning of the vessel on her release from requisition.

4. At all times material to this suit, the *Hawaiian* was a steel, ocean-going, single-screw, steam freighter built in 1919, documented under the laws of the United States, and was classed A1 by the American Bureau of Shipping.

Her deadweight carrying capacity was 9,460 tons and her bale cubic capacity was 413,495 cubic feet. She was designed to carry all types of goods, except liquids in bulk and refrigerated cargo, but was especially well suited for the carriage and handling of general cargo by reason of having three complete decks, an extra (orlop) deck in No. 1 hold, 5 cargo hatches, and 7 sets of cargo gear.

The vessel's propelling machinery consisted of quadruple-expansion, reciprocating engines of 3,400 indicated horsepower and four oil-burning, scotch-type boilers, giving her a speed in excess of 12 knots. By reason of her bunker capacity of 16,306 barrels and daily consumption of 206 barrels, the *Hawaiian* had a cruising radius of 23,420 miles.

The register dimensions of the vessel were: length, 404.6 feet; breadth, 53.9 feet; depth, 26.2 feet. Her draft on summer load line was 28′ 5¼″ and her corresponding gross register tonnage was 6,264 tons.

Her equipment included a heavy lift boom, special lockers for valuable cargo, radio direction finder, electric sounding machine and spare parts in excess of those required by the American Bureau of Shipping.

The crew complement, including master, was 39.

The *Hawaiian* was acquired by plaintiff in 1925 at a cost of $375,000. As of December 31, 1937, her total capital costs to plaintiff had amounted to $414,669.55, and she was carried for tax purposes on the books of the company at a remaining value of $99,859.05. As of December 31, 1943, the *Hawaiian* was listed for tax purposes as having a remaining value of $13,519.99, and a remaining life of one year.

Defendant does not contend that, as applied to the *Hawaiian*, the basic valuation of $56.25 per deadweight ton (plus allowances for speed) as of April 1944 found by the

War Shipping Administration in connection with the issuance of General Order No. 37 (see Finding 30) was too high.

5. Surveyors and inspectors representing both plaintiff and defendant examined the *Hawaiian*, both in drydock and afloat, at or about the time of her taking in July, 1943, and found her to be in good condition.

6. Neither at the time of her taking nor at any subsequent time during the bareboat requisition period of the *Hawaiian* was there a free market in the United States for the use of large, ocean-going, American-flag freighters because on April 18, 1942, the use of all such privately-owned vessels had been requisitioned on "time charter basis" by the War Shipping Administration. The War Shipping Administration continued to retain possession and use of substantially all such freighters from April 1942, until after March 2, 1946.

The period of Government use of a number of such freighters began even prior to the general requisitioning in April 1942. The United States Maritime Commission and its successor agency, the War Shipping Administration, had acquired the use of many such freighters by chartering them directly at various times after June 2, 1941. Those agencies had also controlled the employment of various other freighters by directions given in the course of administering the Ship Warrants Act of July 14, 1941 (55 Stat. 591). In such cases, the agencies prescribed the rates of charter hire at levels generally below current market rates. (See Finding No. 21.)

7. Worldwide changes in conditions affecting the profitability of commercial merchant shipping occurred as a result of the outbreak of war in Europe in September 1939.

Prior to the war, there had been an oversupply of shipping throughout the world and particularly in the United States. Afterwards, a worldwide shortage of vessels available for trade developed and, by the end of 1940, shipping space was hard to get. For the first time in years, capacity cargoes were available both outward and homeward.

Under such conditions, economic factors, applicable alike to water and rail carriers, caused earnings of carriers to increase in much higher proportion than the mere rate of increase in traffic, one principal cause being the fact that the costs of carriage do not increase proportionately to increases in the quantity of cargo carried per vessel or train or in the length of the haul. It follows also that an increased rate of earnings does not necessarily imply an increase in the level of tariff rates charged to shippers.

As a result of the foregoing conditions, the commercial earnings of large, American freighters rose sharply during the period 1939-41.

There is no evidence that the ocean tariff rates charged to shippers at the levels fixed by conference carriers at any time during this period exceeded rates justifiable under the conditions, although some charges being assessed in 1941, "mostly other than conference rates," were, in the opinion of the Maritime Commission, excessive.

8. None of the increased carryings of American-flag freighters during the two years following November 4, 1939, included munitions of war or other traffic to or from the combat zones in Europe because the Neutrality Act of November 4, 1939 (54 Stat. 4), excluded our merchant vessels from those zones.

Among the principal underlying causes for the increase in carryings and earnings of American freighters during this period were the following:

(a) The decrease in the effective world supply of freighters available for commercial employment as a result of such war conditions as sinkings, immobilization by blockade, delays by war damage, delays by convoy operations in combat zones, and diversion by belligerents of their own merchant vessels to military use or to use in combat areas from which our shipping was excluded by the Neutrality Act;

(b) The increase in volume of traffic available to American-flag freighters in foreign trade by the decline in com-

petition from foreign-flag freighters on routes outside the combat zones;

(c) The increased proportion of traffic producing higher freight revenues resulting from increased exports of manufactured goods from the United States after Europe was cut off as a source of supply to other world areas;

(d) The general improvement in business conditions in the United States.

9. The earnings of freighters are derived from two principal kinds of operations: (a) charter operation; and (b) berth operation. In addition, some vessels are operated by industrial carriers serving primarily their parent companies.

(a) In a charter operation, a single charterer contracts with the shipowner for the entire carrying capacity of the vessel in consideration of which the charterer agrees to pay the shipowner either a monthly rate of charter hire, as in the cases of bareboat charters and time charters, or an agreed freight per voyage, as in the case of voyage or "trip" charters. Voyage charter freight may be fixed at a stated rate per ton or other unit of cargo (a rate charter), at a stated rate per unit of the vessel's cargo space (a space charter), or at a lump sum (lump sum charter).

Under the usual bareboat charter, the charterer has full possession and operation of the vessel and pays all expenses, including upkeep.

Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses and also for war risk insurance on the vessel.

Under a voyage charter, the shipowner operates the vessel at his expense. The cargo and port expenses and cost of war risk insurance may be borne either by the shipowner or charterer or partially by each, depending on the terms of the charter. Under a "net form" voyage charter,

the charterer or cargo owner pays the expenses incident to the loading and discharge whereas under a "gross form," the ship pays such expenses.

If a charterer is a common carrier or if he subcharters to others, his profit is the difference between (a) the charterer's revenue from freights which he obtains from the actual shippers of cargo or from the subcharterer, and (b) the charterer's expenses which include charter hire or freight and such vessel, voyage, cargo or other expense as the terms of the charter may place on the charterer.

(b) In berth operation, the shipowner is a common carrier transporting goods for the general public at freight rates fixed in conference or other tariffs and paying all the expense of the operation. The entire earning power of the vessel is realized by the shipowner in berth operations, instead of being divided between the owner and the charterer as in charter operations, where the shipowner realizes less than the entire earning power of the ship in the interest of obtaining certainty of income.

10. Plaintiff was engaged, in the normal peacetime operations of the company, in the intercoastal trade. The earnings of plaintiff's fleet of 32 freighters in 1941 and in 1942, up to the time of their requisitioning by defendant on time charter basis, were derived from operations both in the domestic and foreign trades. In the domestic intercoastal trade plaintiff maintained a berth operation. In the foreign trade plaintiff engaged in both charter operations and berth operations with 20 of its vessels.

The earnings per deadweight ton per month (before overhead, depreciation, and taxes) realized by plaintiff from intercoastal voyages terminating in the last quarters of 1939, 1940 and 1941, are as follows:

1939	$1.29
1940	2.23
1941	3.27

Plaintiff's charter operations in foreign trade in 1941 and 1942 (other than those under certain time charters to the United States Maritime Commission) were of two kinds: (a) under 10 commercial time charters made to other private operators; and (b) under 10 space charters to the British Ministry of War Transport for voyages outward from the United States to ports in the Red Sea.

Plaintiff's berth operations in foreign trade consisted of: (a) return voyages to the United States after conclusion of the space charters to the Red Sea; and (b) three round voyages between the United States and ports in South Africa.

11. The average earnings realized by plaintiff from all voyages which commenced in 1941 and terminated in 1941 or 1942 by all plaintiff's vessels operating in foreign trade (except from voyages under charters to the Maritime Commission), were as follows:

Plaintiff's average 1941-42 earnings in foreign trade

[From Plaintiff's Exhibit 25]

	Deadweight, ton months	Profit
1. Time charters (11 voyages)	650,796.57	$3,144,473.61
2. Space charters outward and berth voyages homeward (10 voyages)	547,128.69	3,106,878.53
3. Berth voyages to South Africa (3 voyages)	132,762.67	573,455.02
Total	1,330,687.93	6,824,807.16

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-42

(Before overhead, depreciation and taxes)

$$\frac{\$6,824,807.16}{1,330,687.93}=5.13$$

(After overhead and before depreciation and taxes)

$$\frac{\$6,824,807.16—\$240,480.00}{1,330,687.93}=\$4.95$$

Appendix to Petition.

The average earnings realized by plaintiff from 14 voyages under time charters with the Maritime Commission, with the first voyage beginning on October 17, 1941, and the last terminating on October 12, 1942, were $2.54 per deadweight ton per month, before overhead, depreciation, and taxes.

The average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941-1942, including those under charters to the Maritime Commission, was, before overhead, depreciation, and taxes:

$$\frac{\$8,761,612.69}{2,093,147.93} = \$4.19$$

12. The earnings realized by plaintiff's vessels were typical of the earnings being realized in foreign trade by large American freighters generally during the period preceding the general requisitioning in 1942 (See Findings Nos. 13, 14, 15, and 16), such earnings reaching peak levels in June 1941, and thereafter declining, as the result of the passage of the Ship Warrants Act. Although the evidence establishes that levels of earnings did decline somewhat from peak levels of June 1941, the amount thereof cannot be determined with reasonable accuracy from the record.

13. Illustrative of the earnings then available in foreign berth operations were the earnings of three American freighters of the Hog Island type, which States Marine Corporation bought in late 1940 or early 1941.

Before the outbreak of war in Europe in September 1939, States Marine Corporation operated entirely with chartered foreign-flag vessels. The number of charters which they made per year averaged about 300. An average of 40 time chartered vessels was used to maintain about twelve berth services from the United States to Europe, South Africa and Japan. In addition, the company engaged in numerous full cargo trades and acted as agents for others.

As a result of the scarcity of foreign-flag vessels in 1940, the company began chartering American-flag vessels and

also purchased the three Hog Island vessels in question. Until they were requisitioned on time charter basis in 1942, these three vessels were employed on 23 voyages in the company's berth service between the United States and South Africa. The first voyage began on October 30, 1940, and the last voyage terminated on May 13, 1942. The average profit of the three vessels while so operated amounted to $4.92 per deadweight ton per month (apparently before overhead, depreciation and taxes).

14. The profitability of American freighters in charter or "tramp" operations in foreign trade during 1940-42 is shown by the earnings of two Hog Island vessels, the *Ann Skakel* and the *Patricia Skakel,* purchased in December 1940 and January 1941, respectively, by subsidiaries of Parry Shipping Company, Inc., of New York. Operating under various forms of charter, the vessels loaded or discharged cargoes in the United States, the Far East, India, South America, Canada, and West Africa.

From the voyages of the *Ann Skakel* completed within the company's fisal year ending October 31, 1941, her earnings were $4.22 per deadweight ton per month before depreciation, overhead, and Federal income taxes. From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1942 and prior to requisitioning of the vessel by the War Shipping Administration on May 8, 1942, her earnings were $2.94 per deadweight ton per month before overhead, depreciation, and Federal income taxes. The average earnings of the vessel from the time of its purchase in December 1940 until its requisition by the War Shipping Administration on May 8, 1942 were $3.79 per deadweight ton per month before overhead, depreciation, and Federal incomes taxes.

The first voyage of the *Patricia Skakel* consisted of a space charter from New York to Vladivostok, a voyage charter for a cargo of sugar from Java to Ceylon and a voyage charter with a cargo of ore from India to Baltimore occupying 176 days from the beginning of loading in New

York on January 29, 1941. From that round voyage the vessel's gross revenue was $492,368.33 and her net profit, $298,546.98, equivalent to $6.36 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

From the remaining voyages of the *Patrica Skakel,* commencing in July 1941 and occupying about 384 days, average earnings amounting to $3.27 per deadweight ton per month, before overhead, depreciation and Federal income taxes, were realized by her owner. The average profit realized by her owner from the entire operation up to September 19, 1942, when defendant requisitioned title to the *Patrica Skakel,* amounted to $4.25 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

15. A compilation prepared by certified public accountants from voyage reports submitted to the Maritime Commission by various shipping companies with respect to the earnings of American freighters built before 1939 and of 7,000 deadweight tons and over, on voyages terminating in the last quarter of 1941 or early 1942, show the following:

(a) Owned vessels operated by owner:

On 68 foreign overseas voyages, the average operating profit (before depreciation and overhead) amounted to $5.50 per deadweight ton per month. On 49 foreign nearby voyages, the average operating profit (before depreciation and overhead) was $3.55 per deadweight ton per month. On 55 domestic voyages, the average operating profit (before depreciation and overhead) was $2.64 per deadweight ton per month. The average operating profit (before depreciation and overhead) on all domestic and foreign voyages was $4.41 per deadweight ton per month.

(b) Owned vessels time chartered to others:

On 17 foreign overseas voyages, the owner's average profit (before depreciation and overhead) was $4.44 per

deadweight ton per month. On 2 foreign nearby voyages, the owner's average profit (before depreciation and overhead) amounted to $4.73 per deadweight ton per month. There were no reports of domestic voyages in this class. The owner's average profit (before depreciation and overhead) on all foreign voyages was $4.45 per deadweight ton per month.

(c) Vessels bareboat chartered from others:

These vessels were all owned by the Maritime Commission. On 46 foreign overseas voyages, the charterers' average direct operating profit before the payment of bareboat hire amounted to $4.88 per deadweight ton per month, and after the payment of bareboat hire averaging $2.21 per deadweight ton per month, the charterers' average net profit was $2.67 per deadweight ton per month. There were no reports of foreign nearby voyages in this class, and only 1 domestic voyage.

The foregoing data reflected the results of voyages terminating in the last quarter of 1941 or early 1942, under charters or arrangements made prior to that time.

The foregoing data indicate that the Maritime Commission was, some time prior to the general requisitioning in April 1942, collecting bareboat hire at a rate in excess of the amount ($1.00 per deadweight ton per month) which the War Shipping Administration later proposed to include (see finding 24) in its computation of requisition time charter hire as "bareboat" compensation to owners of requisitioned freighters.

16. Until after the Ship Warrants Act became effective on July 14, 1941, time charter rates of $7.50 per deadweight ton per month were the prevailing rate. Such a rate would yield a "bareboat" return or equivalent of $5.61 per deadweight ton per month (after overhead but before depreciation and taxes) after deducting the actual average vessel and voyage expenses (plus overhead) of $1.89 per deadweight ton per month incurred by plaintiff's vessels while

engaged on 11 voyages under time charters during the period from February 2, 1941 to April 17, 1942.

17. The evidence does not establish that the level of earnings realized by shipowners from the use of freighters such as the *Hawaiian* for the carriage of commercial cargo some months prior to the general requisitioning of all such privately owned vessels in April 1942 could reasonably have been realized by the plaintiff throughout the bareboat requisition period if the *Hawaiian* had not been requisitioned by defendant, but had remained in plaintiff's possession and control.

Economic conditions of demand for and supply of shipping space, which had materially contributed to or brought about the level of earnings realized by shipowners in 1941 from the commercial employment of large, American-flag freighters such as the *Hawaiian,* throughout the bareboat requisition period remained favorable to a continuance of the potential level of earnings of such freighters from commercial employment at or above 1941 levels.

Other factors and circumstances which materially affected the level of earnings realizable from the commercial employment of large, American-flag freighters such as the *Hawaiian* came into being prior to the general requisitioning in April of 1942, on time charter basis, of all such privately owned vessels. On July 14, 1941, the Ship Warrants Act, 55 Stat. 591, was passed. (See finding 21.) After the passage of this Act, there was a substantial decline in the level of earnings realizable from the use of freighters such as the *Hawaiian.* Perhaps as importantly, from the standpoint of impact upon the earnings realizable from the commercial employment of all large, American-flag freighters, this country entered World War II on December 8, 1941.

Thereafter, the level of earnings previously realizable from the employment of large, American-flag freighters such as the *Hawaiian* for the carriage of commercial cargo (see findings 7-16) no longer existed. Although the record

does not establish with great particularity the full extent of restrictions nor the exact amount of reduction in earnings brought about by war conditions, it sufficiently appears from the record that a vessel would have been unable to operate under unrestricted free-market conditions during the bareboat requisition period, not only because of legislative and administrative regulations, restrictions, and controls, but also by reason of historic circumstances and conditions arising from this country's entry into the war.

Convoy protection, with its incident delays, was required in substantially all, if not all, trades. Priorities on steel for repairs and on scarce fuel oil were essential for continued operation of a vessel. It would have been impossible for a privately owned ship to operate in a service geared to securing for its owner the highest revenues, and at the same time to obtain the necessary priorities and protection from the Government. Under all the facts and circumstances of record or of which the court may take judicial notice, the market value of the use of the *Hawaiian* during the period prior to her requisition by the defendant on time charter basis in 1942 does not establish the fair and reasonable value of her use on bareboat basis throughout the period of defendant's requisition of her use on such basis from July 7, 1943, to May 1, 1946.

18. After the Ship Warrants Act became effective and after the entry of this country into World War II, it became progressively impossible, because of war conditions and because of measures taken by the War Shipping Administration and the Maritime Commission pursuant to the Act, for American shippers to operate without acceptance of the Government's schedule of rates, with the consequence that such rates came to be accepted by a substantial majority of such shippers.

19. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship

Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair market rates.

20. The so-called Ship Warrants Act of July 14, 1941, authorized the United States Maritime Commission and its successor, the Administrator, War Shipping Administration, to prescribe certain conditions to be complied with by such shipowners or charterers as might undertake to do so as a condition of obtaining a license called a "ship warrant" entitling their vessels to priority in "the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels" in ports under jurisdiction of the United States. Among the conditions so authorized to be prescribed was an undertaking "with respect to * * * the fair and reasonable maximum rate of charter hire or equivalent." The policy required to be followed by the Commission in the administration of the Act was "to make fair and reasonable provision for priorities with respect to" the importation and transportation of substantial quantities of materials described in Section 4 of the Act.

The schedules of rates of charter hire and other conditions prescribed by the Maritime Commission or its successor from time to time, as hereinafter set forth, in the course of administering the Ship Warrants Act were incorporated in written "Uniform Conditions." A ship warrant would not be issued to an applicant who did not undertake to observe such "Uniform Conditions."

Although plaintiff did apply to the Commission on September 25, 1941, and on October 3, 1941, for ship warrants for its vessels, plaintiff did not incorporate in its application an undertaking to observe the "Uniform Conditions." The Commission declined to issue warrants and returned the application to the plaintiff.

21. The measures taken by the United States Maritime Commission or its successor, War Shipping Administration,

in the course of administering the Ship Warrants Act of July 14, 1941, included the following:

(a) On July 30, 1941, in Press Release 970, the Commission issued "a scale of maximum time charter rates for United States and foreign flag vessels in which the Commission will concur for charters in which their concurrence is indicated on and after August 1, 1941."

Such scale provided for basic time charter hire at the rate of $4.50 per deadweight ton per month for steamships of 10,000 deadweight tons and up, with an additional 10¢ for each ½ knot of speed in excess of 12 knots. The basic rates for steamers of lesser deadweight tonnage were somewhat higher, the rate for a steamer of the *Hawaiian's* tonnage being $4.60 per deadweight ton per month. Such rates were admittedly about 35% below the then existing time charter rate of $7.50. Berth and other rates were to be adjusted on or before September 1, 1941, to conform to time charter rates.

(b) The schedule of time charter rates contained in Press Release 970 formally became part of the ship warrants procedure by its incorporation into the "Uniform Conditions" issued in connection with the "Ship Warrants Rules and Regulations," dated August 14, 1941, and approved by the President, August 26, 1941, to become effective thirty days thereafter.

(c) On January 5, 1942, the Commission issued its Press Release 1117 making public the Commission's General Order No. 49, dated December 30, 1941, and to be effective January 20, 1942, reducing the maximum time charter rates which warrant-holding vessels were required to observe to levels about 28% below those in Press Release 970.

The new basic maximum time charter rate on steamers of 10,000 deadweight tons and up was $3.25 per deadweight ton per month, compared with the rate of $4.50 prescribed by Press Release 970. An additional 10¢ per deadweight ton per month was allowed for each knot of speed in excess

of 10 knots up to 14 knots. For steamers of the *Hawaiian's* tonnage, the new basic maximum rate was $3.35 per deadweight ton per month, as compared with the previous maximum of $4.60. After speed adjustments, the new rate for a steamer like the *Hawaiian* would have been $3.55, as compared with the previous maximum rate of $4.60 under Press Release 970.

(d) Berth rates and certain other rates charged by the operators of warrant-holding vessels were also required by General Order No. 49 and Press Release 1117 to be so adjusted as not to be "in excess of the charges for such service or arrangements in effect September 1, 1940 * * * plus such reasonable additional surcharge as may be approved by the Commission" to cover increases in operating expense subsequent to September 1, 1940, and such requirement was incorporated into the ship warrant procedure by means of revised "Uniform Conditions" issued January 13, 1942.

Surcharges on berth rates were, in fact, authorized by "rate orders" of the War Shipping Administration issued throughout the period 1942-46 until the Warrant Act Regulations were revoked in 1946.

(e) In cooperation with the War Shipping Administration, the American Institute of Marine Underwriters and British Underwriters adopted a special provision called a "Ship Warrant Warranty," to be inserted in ship hull insurance policies issued on and after February 20, 1942 making the holding of a ship warrant a condition of the validity of the insurance.

(f) After February 2, 1943, "nonwarrant holding vessels" were forbidden to use a "facility" without special authorization obtained by application to the War Shipping Administration. Such special authorizations were issued infrequently. The effect was to prohibit such vessels from obtaining repairs, fuel, stevedoring and towage in United States ports, even though the furnishing of such services would not interfere with service to a warrant holding vessel.

Before the "Ship Warrant Warranty" device was brought into operation and, later, all use of shore facilities was denied to vessels not holding warrants, the Warrants Act had been ineffective to compel operators to obtain warrants merely because of the priority accorded to warrant-holding vessels in the use of shore facilities.

22. Prior to the general requisitioning in April 1942, many shipowners protested against the schedules of rates prescribed for warrant-holding vessels. There were few, if any, unqualified acceptances of the P. R. 1117 scale of rates. As a result, readjustments were allowed by the War Shipping Administration by means of "escalator clauses" and by giving the subsequent time charter requisition rates retroactive effect to January 20, 1942.

23. Following the general requisition on time charter basis in April 1942, the War Shipping Administration on May 14, 1942, issued its General Order No. 8, establishing a scale of requisition time charter rates at amounts intermediate between those in the Maritime Commission's Press Release 970 of July 30, 1941, and those in the Commission's Press Release 1117 effective January 20, 1942. The new scale was made retrocative to January 20, 1942.

Under the General Order 8 scale, steamers of 10,000 deadweight tons and up received time charter hire at $3.75 per deadweight ton per month on sailings prior to May 16, 1942, and at $4 on sailing on and after May 16, 1942. Under Press Release 970 the basic rate for such vessels was $4.50 (see Finding 21a), whereas, under Press Release 1117, the rate was $3.25 (see Finding 21c).

Steamers of the *Hawaiian's* tonnage were allowed, under General Order 8, a basic rate of $3.90 on sailings prior to May 16th and $4.15 on later sailings.

24. Before issuing General Order No. 8 on May 14, 1942, the War Shipping Administration made an investigation

of the average cost of operating various classes of vessels, including vessels built before 1937. In connection with its investigation the War Shipping Administration had requested and received from owners reports showing the financial results of some 597 voyages terminating for the most part in the last quarter of 1941, and in a few instances, in early 1942.

The War Shipping Administration approached the question of a requisition time charter rate scale from the standpoint of the sum of two components: (a) a so-called "bareboat" factor of $1.00 per deadweight ton per month (with certain premiums for speed, refrigeration, and an "off-hire" allowance of 10%); and (b) a factor to represent the average of shipowners' expenses under the proposed form of requisition time charter, together with an allowance for owner's overhead.

(a) the "bareboat" factor of $1.00 per deadweight ton per month was not based upon any approximation of the earnings realized by shipowners from commercial employment of their vessels as shown by the voyage reports above mentioned, indicating such earnings from voyages terminating in the last quarter of 1941 or early 1942. The requisition time charter rates as contained in General Order No. 8 had no relation to the 1941 commercial earnings or the 1941 value of the use of requisitioned vessels. The former Director of Fiscal Affairs of the War Shipping Administration testified at a hearing in this case that "we got together a lot of information and we thought that the best way to fix the rate was to fix it on as low a basis as we possibly could. * * * We know that in 1941 the ships were earning quite a lot of money, and that the rates that were published in General Order No. 8 were nowhere near as high as the earnings the companies were making in 1941."

(b) The expense factor was compiled from statistics on the average vessel expense, from voyages terminating in the last quarter of 1941 or early 1942, for crew's wages,

subsistence of crew, stores, supplies, equipment, repairs, other vessel maintenance expense and insurance, with an allowance for owner's overhead of $100 per day, which was later changed to $125 per day. The resulting figures were adjusted to take into account certain known or anticipated increases in costs and for periods of "off-hire."

The principal study of actual vessel expense related to 60 voyages terminating in the last quarter of 1941 by freighters over 20 years old and having from 8,000 to 8,999 tons deadweight capacity, as this was the largest number of voyages in any one class.

To determine the rates applicable to vessels in tonnage classes below and above the 8,000 to 8,999-ton class, additions or subtractions were made to adjust for assumed differences in average vessel operating costs on a deadweight ton basis.

The vessel expenses and overhead shown by the studies fluctuated so widely and would, therefore, cause such wide variations in compensation to owners under a time form operation that the Director of Fiscal Affairs recommended that the War Shipping Administration substitute a bareboat basis of operation. This recommendation was not followed at that time, however, but was in 1943.

25. Prior to the issuance of General Order No. 8 on May 14, 1942, the question of requisition time charter rates was discussed at a meeting held May 9-11, 1942, between representatives of the War Shipping Administration and a Group of officials (for convenience, hereinafter called the "owner group") representing a number of shipping companies. Among those in attendance were representatives of seven companies holding operating differential subsidy contracts with the Maritime Commission, and of two companies which were subsidiaries of steel companies. Plaintiff was represented at this meeting.

At the meeting, representatives of the War Shipping Administration started discussions with the owner group on

the basis of a "bareboat" component of $1.00 per deadweight ton per month. The owner group was given to understand by the Director of Fiscal Affairs that if there was not general acceptance of "a rate that I thought was low enough," he would recommend requisition of title to their vessels.

The owner group declined to discuss rates composed of stated component parts, and the rate finally arrived at was understood to be an "overall rate." However, owner's costs under time charter form of operation of freighters in the 8,000 to 8,999-ton class were discussed between a subcommittee of the owner group and the Comptroller of the War Shipping Administration and various adjustments were made (see finding 24) to arrive at a total proposed rate of $4.10 per deadweight ton per month for freighters in the 8,000 to 8,999-ton class on sailings after May 16, 1942.

Finally, after some of the owner group had indicated that they would recommend acceptance if 25 cents per deadweight ton per month were added to bring the rate as a whole to $4.35, the rate was increased to $4.35. The evidence does not furnish any clear explanation as to the calculation of the rates of hire applying to vessels having tonnages greater or less than those in the 8,000 to 8,999-ton group, but the rate applicable to vessels of the *Hawaiian's* tonnage on sailings after May 16, 1942, was $4.15. On account of the *Hawaiian's* speed (in excess of 12 knots), she was entitled to $4.35.

It does not appear from the evidence that plaintiff's representatives were included in that portion of the owner group which had agreed to recommend acceptance if the 25 cents were added to the $4.10 rate. One of plaintiff's officials in attendance stated to the meeting that he was reasonably sure plaintiff would not accept. The time charter rates promulgated in General Order No. 8 were ultimately accepted by plaintiff.

26. The evidence in the record establishes that 79 owners of 390 vessels accepted defendant's time charter rates, including plaintiff.

As stated in the preceding finding, the owner group was advised at the May 1942 meeting that if there were not general acceptance of "a rate that I thought was low enough," the Director of Fiscal Affairs would recommend requisition of title to their vessels. One of the owner group present at the meeting declined to accept the time charter rates, and his vessels were later requisitioned for title. Under these circumstances, practical considerations with regard to the shipowner's organization and post-requisition prospects weighed in favor of acceptance of the time charter rates.

Some shipowners had incurred expenses from operating vessels on requisition status or on unexecuted time charter status from dates as far back as January 1942. Acceptance of the time charter rates promulgated in General Order No. 8, or, in the alternative, acceptance of 75 per cent of "just compensation" as determined by the War Shipping Administration with the right to have the amount of just compensation judicially determined, was necessary in order to obtain reimbursement for these expenses. In plaintiff's case, such unreimbursed outlays amounted to about $2,000,000 at the time when the requisition time charter rates were tendered for acceptance.

Time charters were not accepted by all affected owners, and the evidence establishes that many of the charters which were accepted were accepted at a much later date, in connection with settlements by transfer of title or otherwise.

27. In November 1942, a dispute occurred between the Comptroller General of the United States and the Administrator, War Shipping Administration, regarding the application of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act, 1936, to the determination of just compensation for requisitioned vessels. The Comptroller General ruled that the "enhancement clause" prohibited the payment of compensation for vessels to the extent that it might be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused

by the national emergency. As a result of a notice issued December 17, 1942, the Administrator commenced to withhold 25% of the hire payable under the terms of the requisition time charters. Thereafter, the *Hawaiian* was requisitioned on bareboat basis (See Finding No. 1), and similar requisitions of plaintiff's other vessels followed.

On October 15, 1943, the President appointed an Advisory Board on Just Compensation, which on December 7, 1943, rendered a report of its views on the principles which should be followed by the Administrator in determining just compensation.

Meanwhile, by notices dated October 15, 1943, November 1, 1943, and November 24, 1943, the Administrator instituted a "Revised Program of Ship Requisition, Charter and Operation," which, in effect, provided for termination of the requisition time charters then remaining in force and for a general requisition on boreboat basis. Exception was made for cases where owners might elect to remain on time charter basis but with a revised form of charter and at revised rates.

Thereafter, the compensation offered by the War Shipping Administration for the use of vessels requisitioned on bareboat basis was fixed by General Order No. 37, issued on April 7, 1944.

28. General Order No. 37 was prepared by the Division of Large Vessel Procurement of the Was Shipping Administration under the supervision of the Assistant Deputy Administrator for Fiscal Affairs. The basic rate of bareboat charter hire provided by General Order No. 37 for all dry cargo vessels built during the period 1914-34 was $1.25 per deadweight ton per month.

In a memorandum submitted on April 15, 1944, to the House Committee on the Merchant Marine and Fisheries, the Administrator, War Shipping Administration, stated that "the proposed basic rates of General Order No. 37 are:

(1) below actual earnings of 1940 and not greatly in excess of earnings of 1939;

(2) only about 40 percent of the rate recently fixed by the court in the *Olson case;*

(3) only about 40 percent of the bareboat rates paid by the Army and Navy in 1941;

(4) less than one-third of the rate fixed administratively in the first [world] war;

(5) about one-third of the actual earnings of 1941;

(6) about one-fifth of the rates allowed by the courts in the first [world] war; and

(7) less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941."

The principal preliminary findings in connection with determination of the rate of bareboat charter hire for freighters built prior to 1935 were that the market value of their bareboat use could not be determined by sufficient hirings made at or about the time of taking, and that the value of the use should be determined in accordance with Rule 3 of the Advisory Board on Just Compensation, which provided as follows:

> Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that

would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

The method used by the War Shipping Administration was to give predominant consideration to two "factors", each of which, it was found, showed that an amount of about $1.25 per deadweight ton per month would constitute just compensation for bareboat use. The two "factors" were:

(a) The average amount of "adjusted earnings under current charters", (i. e., under the requisition time charters) and, alternatively;

(b) A sum sufficient to provide for (1) annual "depreciation" on the valuation of the vessels, and (2) a "reasonable rate of return" on such valuation.

Further facts regarding these two alternative factors and the subsidiary findings of the War Shipping Administration in connection with those factors are stated in findings 29, 30, and 31.

29. In connection with the first factor, it was found that the "adjusted earnings" of the average dry cargo vessel built prior to 1935 had amounted to $1.275 per deadweight ton per month under the requisition time charters.

The procedure of using as a factor in determining just compensation for use under the bareboat requisitions the average "adjusted earnings" under the scale of rates fixed by the War Shipping Administration in connection with its prior requisition on time charter basis was explained on the ground that the requisition time charters were the only "hirings" immediately before the general requisition on bareboat basis.

Some consideration but no effect was given to the earnings which requisitioned vessels had realized for their owners prior to defendant's taking of the vessels in April 1942, the reasons given being, in substance, that such earnings were considered to be no longer available to private

shipowners and that time charter rates had been decreasing for some time prior to the general requisitioning on time charter basis in April 1942.

Earnings then being realized by defendant on particular voyages from the employment of requisitioned vessels for the carriage of commercial cargo were not taken into account by the War Shipping Administration in determining just compensation for the use on bareboat basis of requisitioned vessels. Vessels requisitioned by the War Shipping Administration were used for the carriage of military, lend-lease, and commercial cargoes. The evidence does not establish that it was possible for the War Shipping Administration to segregate the results of voyages in which requisitioned vessels were used for the transportation of commercial cargo, as distinguished from voyages in which military or lend-lease cargoes, or combinations of types of cargoes, were carried. The primary consideration in the employment of requisitioned vessels by the War Shipping Administration was the effective utilization of such vessels as a pool of shipping in the interests of furthering the war effort. Vessels were necessarily used uneconomically in many instances, while in other instances vessels were placed in trades where there was an opportunity for profit. The evidence does not establish that earnings realized on particular voyages by defendant from the employment of requisitioned vessels for the carriage of commercial cargo bear any reasonable relationship to just compensation for the use on bareboat basis of requisitioned vessels.

The statement of "adjusted earnings" of the average dry cargo vessel built prior to 1935 consisted in part of deductions of estimated amounts for "deferred repairs", "allowance for risks", and "overhead", which defendant's witness on the subject was unable to substantiate and which are not shown to have any material application to the *Hawaiian*.

A comparison of the actual audited figures of the plaintiff and of States Marine Corporation for all their operations

under the requisition time charters, and the War Shipping Administration figures shows the following result:

Comparison of W. S. A. estimate of "adjusted earnings" under requisition time charters with actual earnings of plaintiff and of States Marine Corporation.

Items		W. S. A. estimate (Def. Ex. 19B)	Plaintiff (Pl. Ex. 68)	States Marine (Pl. Ex. 73)
1. Actual charter hire		$4.098		
2. Allowance for accrued off hire		.066		
3. Adjusted charter hire		4.032	$3.96	$4.30
4. Reported operating costs	$1.882			
5. Allowance for deferred repairs	.215			
6. Allowance for risks	.250			
7. Adjusted operating costs		2.347	1.89	*1.93
8. Adjusted earnings before overhead		1.685	2.07	2.37
9. Allowance for overhead		.41	**.17	†0
10. Adjusted earnings		1.275	1.90	#2.37

* Includes $45,343.71 of disputed items of expense equivalent to $0.09 per deadweight ton per month.

** At $60 per day, being the husbanding fee allowed by the W. S. A. to General Agents.

† Husbanding expense is included in operating costs. (*McGrath*, p. 1898.)

The actual figure in Plaintiff's Exhibit 73 is $2.40. The figure of $2.37 appearing in the above table is derived from use of months of 30 days each for convenience in calculating the number of "deadweight ton months."

30. In connection with the second alternative "factor" claimed to support the rate of $1.25, three subsidiary "findings" were made by the War Shipping Administration staff:

(a) That the average valuation of requisitioned dry-cargo freighters built prior to 1935 amounted to $75 per deadweight ton as of April 1942 when the general requisitioning on time charter basis had occurred;

(b) That the average anticipated remaining life of such vessels after April 1942 was eight years and their consequent annual rate of "depreciation" was 12½%.

(c) That annual hire at the rate of $15 per deadweight ton (equivalent to $1.25 per deadweight ton per month), would provide both: (i) "a reasonable rate of return" of $5.625, representing 10% of $56.25, the average depreciated valuation of the vessels per deadweight ton as of April 1944; and also, (ii) $9.375, representing the amount of annual depreciation on the average value of $75 (as of April 1942), at the annual rate of 12½%.

(a) With regard to the subsidiary findings that requisitioned freighters built prior to 1935 all had a value of $75 per deadweight ton in April 1942 and that the depreciated value of such freighters in April 1944 was $56.25 per deadweight ton, "the most reliable measure of evaluation" was, in the opinion of the War Shipping Administration, "the value as of the date of general requisitioning in April 1942, depreciated to the date of said determination."

No factual justification appeared for lumping all such vessels together and assigning them the same valuation. On the contrary, the Administration's Division of Statistics and Research found, in respect of the sales and appraisal data studied covering dry cargo vessels of 7,000 to 12,000 tons deadweight, that:

> Any trends or central tendencies noted in this study are qualified by the fact that the number of dry cargo vessels and tankers under consideration is small, probably too small for statistical analysis. Furthermore, vessels of the size included here are quite individualistic in character and would show a high degree of dispersion from any median or average. The best that the data have to offer are some suggestions and tentative conclusions.

Eight "elements" were stated to have been considered in arriving at the April 1942 valuation finding. Of these, two "elements" relating to depreciated construction cost were given little weight. The significance of an "element" consisting of two private sales occurring in January and February 1941, and another "element" consisting of a "peak sale," also in 1941, was unexplained. Little, if any, weight was given to the "element" of average sales in 1941 from the Government's laid-up fleet. The "element" of appraisal data showing values of $76 in 1942 and $70 in 1943 consisted of some 18 appraisals in March, April, and May 1942, of which 15 were by the Maritime Commission, and three private appraisals in 1943.

The final "element" consisted of "values under current charters," which were found to be from $70 to $75 per deadweight ton. This figure was the valuation which the assumed average vessel would have under the scale fixed by the War Shipping Administration in General Order No. 9 for purposes of war risk insurance under the requisition time charters. After a consideration and weighing of all of the above "elements", the figure adopted by the War Shipping Administration was a valuation of $75 per deadweight ton.

(b) The second subsidiary finding above mentioned was that because of assumed obsolescence, such vessels had a useful remaining life of eight years and a consequent annual "depreciation" of 12½ per cent commencing in April 1942. "Depreciation" was not used in the usual accounting sense but as a measure of a wasting asset approaching the end of its useful life, because of the judgment of the War Shipping Administration that subsequent to the war and immediate post-war periods old vessels would be unable to compete commercially with newer vessels, and that the value of old vessels, except for scrap purposes, would probably be exhausted during the anticipated war and immediate post-war periods.

(c) The third subsidiary finding, that a 10 per cent rate of return on the War Shipping Administration's valuation of the vessels as of April 1944 was a "reasonable rate of return," was based upon the exercise of the judgement of the War Shipping Administration's staff. It was founded, in part, upon the "personal judgment as a business man" of the Assistant Deputy Administrator for Fiscal affairs, and in part upon the judgment of the War Shipping Administration's staff "of what public opinion would consider a reasonable rate of return."

31. It is not possible to conclude from the evidence that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire the *Hawaiian* on or about July 7, 1943, or at any other time during her requisition period.

32. The fair and reasonable value of the use of the *Hawaiian* during the period of bareboat requisition is not capable of measurement with mathematical exactness. From a consideration and evaluation of all of the relevant facts and circumstances of record or of which the court may take judicial notice, including, but not limited to, the general characteristics of the *Hawaiian*, her physical condition, her age, the level of earnings realized by owner from the use of vessels both prior to requisition and under requisition time charter, the demand for and supply of shipping space, the legislative and administrative restrictions to which vessels were subject, and considering the uncertainties caused by this country's participation in World War II, it is found that a bareboat rate of $2.50 per deadweight ton per month during the bareboat requisition period constitutes just compensation for the use of the *Hawaiian*, which does not include any enhancement caused (1) by the Government's need of vessels which necessitated the taking, (2) by the previous taking of vessels of similar types, or (3) by a prospective taking reasonably probable.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover.

The entry of judgment is suspended until the incoming of a stipulation by the parties, or, in the absence thereof, until the incoming of a report of a Commissioner showing the amount due plaintiff, computed in accordance with this opinion.

ORDER OF THE COURT ENTERING JUDGMENT.

(Caption Omitted.)

ORDER.

On October 5, 1954, the court held that plaintiff was entitled to recover but suspended the entry of judgment pending either the filing of a stipulation by the parties or a report by the Commissioner of the court showing the amount due plaintiff computed in accordance with the court's decision.

On February 28, 1955 and March 14, 1955, reports were filed by the Commissioner showing that the sum due plaintiff in accordance with the court's decision is $492,607, together with interest at the rate of 4% per annum, not as interest but as part of just compensation.

Said interest is to be computed on the unpaid balances of each monthly installment from the dates when currently due until the date of payment of judgment or, if previously paid, until paid. As of this date, there is found to be due plaintiff the sum of $204,220.71 so computed with further interest to be computed at the rate of $53.9843 per day until date of payment of judgment.

NOW, THEREFORE, IT IS ORDERED this sixteenth day of March, 1955, that judgment be and hereby is entered for

plaintiff in the sum of four hundred ninety-two thousand six hundred seven dollars ($492,607) together with interest at the rate of four percent (4%) per annum on arrearages, not as interest but as part of just compensation, in the sum of two hundred four thousand two hundred twenty dollars and seventy-one cents ($204,220.71) as of this date with further interest until date of payment to be computed at the rate of $53.9843 per day.

By the Court,

MARVIN JONES,
Chief Judge.

DEFENDANT'S MOTION FOR REHEARING.

On March 25, 1955, defendant filed a motion for a rehearing.

On May 3, 1955, the court entered the following order on said motion:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the rules of this court and, on consideration thereof,

IT IS ORDERED this third day of May, 1955, that said motions be and the same are overruled as follows:

* * * * * *

48758 American-Hawaiian Steamship Company, as Owner of the American Steamship *Hawaiian*, Defendant's motion.

* * * * * *

By the Court

/s/ MARVIN JONES
MARVIN JONES
Chief Judge.

PART II.

TEXT OF STATUTES INVOLVED.

The Merchant Marine Act, 1936, as amended, (46 U. S. C. 1242, 49 Stat. 2015, 53 Stat. 1254), contains the following provisions regarding the requisitioning of ships:

"SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President,* it shall be lawful for the Commission** to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the

---

* An "unlimited national emergency" was proclaimed by the President on May 27, 1941 (55 Stat. 1647).

** By Executive Order No. 9054 issued February 7, 1942 (7 Fed. Reg. 837), the President established the War Shipping Administration, under the direction of an Administrator, and transferred to the Administrator various functions of the United States Maritime Commission, including its powers under Sec. 902 of the Merchant Marine Act and under the Ship Warrants Act.

owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

[Section 902 (b) is omitted because it is applicable only to vessels upon which a construction-differential subsidy has been allowed and paid. None of the petitioner's vessels were constructed with the aid of a construction-differential subsidy from the government.]

'(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk

assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

• • • • • •

The "Ship Warrants Act," (Act of July 14, 1941; P. L. 173, 77th Congress; 55 Stat. 591; 50 War App. U. S. C. Secs. 1281-1286):

AN ACT

To Provide for Priorities in Transportation by Merchant Vessels in the Interests of National Defense and for Other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during the emergency declared by the President on May 27, 1941, to exist, but not after June 30,

1943,* the President may, notwithstanding any other provisions of law, whenever he deems it in the interest of national defense, including the maintenance of essential supplies and services, authorize the United States Maritime Commission to issue warrants as hereinafter provided with respect to any vessel documented under the laws of the United States or any vessel not so documented but owned by a citizen of the United States. Such warrants may also be issued to foreign-flag vessels not owned by citizens of the United States upon application therefor by the owner of said vessel or the charterer thereof on behalf of such owner. Such application shall be in such form as the United States Maritime Commission may prescribe. All warrants shall be issued and may be revoked pursuant to regulations issued by the United States Maritime Commission with the approval of the President.

SEC. 2. The warrants to be issued pursuant to this Act shall be in such form as the Maritime Commission shall prescribe, and shall set forth the conditions to be complied with by the affected vessel as a condition to receiving the priorities and other advantages provided in this Act by reference to an undertaking of the owner or charterer with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, *the fair and reasonable maximum rate of charter-hire or equivalent*,** and such incidental and supplementary matters as appear to the United States Maritime Commission to

---

* By Resolution of June 16, 1942 (56 Stat. 370), the Ship Warrants Act was continued in effect for the duration of the war and six months thereafter. The Ship Warrant rules and regulations were revoked on June 6, 1946 (11 Fed. Reg. 6341), and the Act itself was repealed on July 25, 1947 (61 Stat. 449).

** Italics ours.

be necessary or expedient for the purposes of the warrant. Nothing in this Act shall authorize the United States Martime Commission to require the owner or charterer to relinquish the manning, storing, victualing, supplying, fueling, maintaining, or repairing of his vessel to any other person or persons. Nothing in this Act shall be deemed to alter, amend, or repeal any of the coastwise laws of the United States.

SEC. 3. Vessels holding warrants issued pursuant to this Act shall be entitled to priority over merchant vessels not holding such warrants, (with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels). Vessels holding warrants shall have such priority as among themselves, as the United States Maritime Commission shall determine to be necessary and advisable in the interests of national defense, or as may be specified in the warrants. Persons in the United States, including the Philippine Islands and the Canal Zone, furnishing any of the above-mentioned facilities shall be authorized, and under rules and regulations prescribed by the United States Maritime Commission with the approval of the President may be required, to grant such priorities, anything in any contract whether heretofore or hereafter made to the contrary notwithstanding.

SEC. 4. In the administration of this Act it shall be the policy of the Commission to make fair and reasonable provision for priorities with respect to (1) the importation of substantial quantities of strategic and critical materials, (2) the transportation of substantial quantities of materials when such transportation is requested by any defense

agency, and (3) the transportation in the foreign or domestic commerce of the United States of substantial quantities of materials deemed by the Commission to be essential to the defense of the United States: *Provided,* That there shall be no unjust discrimination between ports of the United States. Nothing in this Act shall authorize the exaction of any sum from the holder of a warrant solely for the privilege of carrying cargo on any route. Vessels that on January 1, 1941, were engaged primarily in the coastwise transportation of coal for national defense and domestic consumption shall be granted warrants only so long as they continue in the same service as of said date, except that in case any such vessel ceased, before June 15, 1941, to engage in such transportation of coal and before such date became principally engaged in the transportation of defense materials, the Commission may grant such vessel a warrant for such service as it deems suitable pursuant to section 2.

SEC. 5. The term "citizen of the United States" as used in this Act includes corporations, partnerships, and associations existing, authorized, or organized under the laws of the United States or any State, district, Territory, or possession thereof.

SEC. 6. Whoever willfully violates any rule, regulation, or order issued under the authority conferred herein shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years or both: *Provided,* That the District Court of the Canal Zone and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction over offenses committed against the provisions of this Act within the Canal Zone and the Philippine Islands respectively.

Approved, July 14, 1941.

PART III.

Evidence Relating to the Admitted Purpose and Actions of the United States Maritime Commission and the War Shipping Administration to Compel an Arbitrary and Drastic Reduction of Shipping Rates Prior to Requisitioning so as to Enable Vessels to Be Requisitioned at Such Arbitrarily Reduced Rates.

The record leave no doubt of the purpose of the Maritime Commission and the War Shipping Administration to force a reduction of shipping earnings by all possible means, including coercion, and to delay requisitioning until such reduction could be effected, all with the intent of obtaining privately-owned vessels for public use at levels of rates thus reduced rather than at rates determined in accordance with the standards of just compensation required by the Fifth Amendment to the Constitution.

Among the items of evidence on the point are the following (emphasis by italics or otherwise is by us):

(a) Statements to Congress on March 30, 1943, by Marshal L. Wilcox, formerly Assistant Director, Division of Emergency Shipping, United States Maritime Commission (Def. Ex. 4, p. 168 *et seq.*):

Pp. 170-1:

> *"Early in our effort at world-wide rate control, • • • the British and ourselves agreed that neither one of us would condone time charters which were made in excess of $7.50 per ton.*
>
> "Prior to this tacit understanding between the British and ourselves, fixtures had been made at $8, $9 and $10, and some even higher, which neither the British nor ourselves were in a position to control or to have reduced.
>
> "In July 1941, • • • the Ship Warrants Act and the declaration of the unlimited national emergency

on May 27, gave the Commission some substantial background for further and more direct control over both charter rates and berth freight rates.

"The new rates promulgated by the Commission on July 30, 1941, were on the basis of $4.50 per dead-weight ton, WHICH REPRESENTED AN ARBITRARY REDUCTION *of $3 per ton under what had been more or less considered a going rate prior to that time.*

"To make this action effective or as nearly so as possible, the Commission issued press release No. 970, dated July 30, 1941, establishing the basic rate of $4.50 per ton.

"On January 5, 1942, the Commission issued press release No. 1117, which further reduced the time charter rates, effective January 20, to a basis of $3.25 per dead-weight ton per month.

"The owners objected strongly to this new reduced rate and submitted considerable data to substantiate an upward adjustment to cover increases in operating costs.

"Considerable study between January 5, 1942, and May 14, 1942, demonstrated the need for an adjustment to meet these costs. *A revised scale was established whereby rates on sailings between January 20 and May 16, 1942, would be on the basis of $3.75 per ton, and subsequent to May 15, 1942, on the basis of $4 per ton.*

"Those new rates are covered by General Order No. 8 of the War Shipping Administration which is also attached.

"The foregoing is a brief summary of the conditions with respect to ocean freight rates existing between February 1941, and May 1942, pointing out the efforts of the Maritime Commission and the War Shipping Administration to put charter rates and berth freight rates on a fair and reasonable basis."

P. 192: *"The policy of the Commission was to go along and to get the rates reduced before there*

was any requisitioning. The rates were still in the process of reduction on May 27, [1941], and they were still pretty high on May 27."

P. 214: "*Mr. Hart. You say that the Commission did not requisition* on May 27 [1941] or *until some considerable time later?*

"*Mr. Wilcox.* That is right.

"*Mr. Hart.* What was the reason for that? Let us have the reason, if you are able to state it.

"*Mr. Wilcox.* There were two reasons primarily, and one of them was this: that the rates, both time and charter, and the bareboat equivalent yield through private rates, were what in our opinion were higher. *We wanted first to get the rates down to a lower level,* and to get some voluntary contracts with shipowners to establish a considerably lower market value for vessels, *so that at the time requisitioning came in we would have a lower rate level than prevailed in April and May.* The thought behind that was that it would take maybe a few weeks or months to reduce the rates, whereas, heaven only knows how long the requisition period would last, whether 1 year or 10 years, but if it were going to last for a 10-year period *we wanted the rates at a low level so that the over-all payments by the Government would be considerably less than if we were forced into requisition at the higher rates.*

* * * * * *

"Now, *the thing we were driving at was this: In April, the time charter rates were around $10 and $10 or $12 on some fixtures, and there were many American vessels which were operating on time charter at $7 and $7.50, and there were a couple that I recall at $8, or a little bit over $8.*

"*Now, we wanted to get them down to approximately $4 or $4.50 before we got into requisitioning and* we felt that our position would be materially

strengthened in the courts and out of courts and every place else if we had voluntary agreements with owners on a $4 or $4.50 basis."

P. 215: *"Mr. Ellison. What factors were operating to make you think that by waiting the rates would be reduced?*

"Mr. Wilcox. THE BIG STICK AND THE SHOTGUN.

* * * * * *

"Mr. Wilcox. There were two procedures. In the first place, the *American owners and operators did cooperate with us splendidly. That was No. 1.*

"No. 2 was that along in July or thereabouts the Ship Warrants Act was passed prior to that time, *and the British had a Ship Warrants Act,* and the British could exercise control with their Warrants Act in places where we had no control. They could catch up with some of the ships. When our Warrants Act was effective we could control ships through our Warrants Act, we could control the rates of the vessels and so forth. *As far as the American ships were concerned,* IT WAS NOT BY AND LARGE TOO HARD TO HIT THOSE FELLOWS WITH A CLUB UNDER THE BRITISH OR THE AMERICAN WARRANTS ACT. There were some recalcitrant neutrals who had to be brought into line.

"The records will show *from the time we first started* endeavoring to catch hold of the rates *until about the first of December, which was still prior to Pearl Harbor, we had gotten the rates down to $4.50* time-charter movement. THAT IS KNOCKING OFF, ROUGHLY, $6 OF $7 A TON PER MONTH ON A TIME-CHARTER BASIS OVER A PERIOD OF ABOUT 6 OR 7 MONTHS.

"Mr. Ellison. When you had the rates reduced by the method you described was there a demand for shipping space, for the cargoes available so that the demand was there for the ships?

"*Mr. Wilcox.* YES; THERE WAS A DEMAND, AND THE DEMAND WAS CONSTANTLY INCREASING.

"*Mr. Ellison. Notwithstanding those factors that the demand was there and the shortage of ships, you were still able to get the rates down?*

"*Mr. Wilcox. That is correct.*

P. 216: "*Mr. Hart.* DID THE COMMISSION ITSELF REGARD THE WARRANTS ACT AS A COERCIVE MEASURE?

"*Mr. Wilcox.* WE REGARDED IT AS A MEASURE WHICH WOULD ENABLE US TO GET VESSELS, PARTICULARLY NEUTRAL VESSELS, TO DO WHAT WE WANTED THEM TO DO. WHEN I SAY NEUTRAL VESSELS I MEAN OTHER THAN AMERICAN VESSELS.

"*Mr. Hart.* TO GET THEM TO DO SO BY SOME PROCESS OF COERCION?

"*Mr. Wilcox.* THAT IS RIGHT, AND THE PROCESS WAS PRIORITY IN THE USE OF TERMINAL AND PORT FACILITIES.

P. 222: "*The point that I hope we are able to make is that beginning in February 1941, and up until our present time, and follow the thing projected as far as you like,* THAT THERE HAS BEEN A VERY DEFINITE EFFORT ON THE PART OF THE MARITIME COMMISSION AND THE WAR SHIPPING ADMINISTRATION TO HANDLE ALL OF THESE AFFAIRS ON A BASIS WHICH WOULD COST THE GOVERNMENT IN THE OVER-ALL PICTURE THE SMALLEST POSSIBLE AMOUNT."

(b) Statements to Congress by Admiral E. S. Land, Chairman, United States Maritime Commission, and Administrator, War Shipping Administration:

(i) On December 15, 1942, (Def. Ex. 14)—

P. 19: "*The essence of the matter,* from the Commission's standpoint *lies in the rising market* for ships since September 1939, *and the unfolding*

of the Commission's policy toward the acquisition of ships for the war effort in the face of that rising market."

P. 20: *This upswing carried top world-time charter rates to nearly $10.50 per ton before the Maritime Commission's shipping-pool plan got started under the Ship Warrants Act in the summer of 1941."*

P. 21: *"The Commission has been able to lower and flatten out these price curves through the use of its authority with respect to ship warrants and war-risk insurance.*

"This stabilization of prices and charter rates *reflects the attainment of a goal toward which the Maritime Commission had been striving ever since the responsibility devolved upon it for the acquisition and operation of ships in the national defense effort."*

Pp. 23-4: *"The Maritime Commission believes that its efforts to provide shipping for national defense and war,* without taking title from the private owners, and at stabilized, reasonable charter rates, have had and *will have the effect of saving the United States hundreds of millions of dollars* • • •."

P. 32: *"Mr. Oliver. Has the Commission exercised the requisitioning power* in any case except where ships were acquired for the use of the Army or the Navy?

• • • • • •

"Admiral Land. I would not like to answer that positively, Mr. Oliver, because *I am not sure that there might not have been some cases where we had some recalcitrant shipowners,* AND IF WE CANNOT DO ANYTHING ELSE WE CAN PUT

COMPULSION ON THEM, AND IN THAT EVENT WE WILL DO IT. THAT COMPULSION WORKED FAIRLY WELL IN SOME CASES."

(ii) On March 22, 1943, in a letter to Congressman Hart, (Def. Ex. 4)—

P. 11: (Referring to the Red Sea charter negotiations in May, 1941)—"*The alternative would have been requisitioning. The Commission wanted to avoid, or at least to postpone, the application of section 902 until there had been a further opportunity to effect a reduction of ship earnings and values.* THE COMMISSION WAS INTENT UPON EFFECTING A DOWNWARD REVISION OF THE WHOLE STRUCTURE OF RATES AND VALUES BEFORE RESORTING TO REQUISITION."

(iii) On June 10, 1943, at a hearing on Just Compensation for Requisitioned vessels held before the House Committee of the Merchant Marine and Fisheries, (Pl. Ex. 78)—

At p. 4 of the Exhibit: "PREWAR HIGH PROFIT LEVEL IN STEAMSHIP INDUSTRY HAS BEEN DESTROYED.

"There has been an erroneous tendency to assume that the steamship industry is now enjoying enormous prosperity.

"This is not true.

"High profits were earned in 1941, before we became involved in the war; but these high profits are now a thing of the past.

"Generally speaking, the 1941 prosperity was not based on moneys received from the United States Government, for we were then at peace and had not requisitioned our merchant fleet, **but rather on the great improvement in the steamship business in that year, which was world-wide in scope.** The history

of the steamship industry indicates that these peak periods occur once in 10 or 20 years. **In this case, the boom was rather short-lived, since the Maritime Commission and the War Shipping Administration rates of hire have drastically reduced steamship earnings.**

* * * * * *

P. 5: "**The existing rates * * * represent drastic reductions in the earnings and profits for the peak year of 1941, when vessel owners earned well in excess of $4 per dead-weight ton on old freighters and tankers.**

* * * * * *

P. 7: "The coordination of shipping for the national defense effort was begun by the Maritime Commission in the early part of the spring of 1941, in accordance with directives from the President. **The Commission had no specific statutory authority with which to control ship values or charter rates.** It was of the opinion, however, that such values and rates were then too high, and **it set about to reduce them to more reasonable levels, using its economic power** in the assembling of a pool of 2,000,000 tons of shipping.

"**Immediately after the adoption of the Ship Warrants Act the Maritime Commission established time-charter rates at levels of approximately $4.50 per dead-weight ton per month.** As more and more ships became subject to the new time charters, the market responded accordingly.

* * * * * *

"**This roll-back of charter rates** and sales values from the inflated levels to which they had climbed during the early months of 1941 represents the fifth phase of the sequence. It **extended from the late spring of 1941 to April 1942, when the sixth phase,**

the requisitioning of vessels, was begun by the War Shipping Administration.

"The Maritime Commission had refrained from requisitioning, as far as possible, in order to accomplish its purpose of reducing and stabilizing rates and values. By the time this objective was in hand, the War Shipping Administration, created by Executive order in February 1942, had assumed the responsibility for the acquisition and operation of vessels in the war effort."

* * * * * *

At pp. 8-9: "However, *even if the Maritime Commission had the power to requisition before May of 1941, the exercise of that power* during the high market conditions of late 1940 and early 1941 *would have been most unwise and unfortunate,* since the owners would then have been in a position to file suit in the Court of Claims for the full market values of that peak period. The results of such premature requisitioning would therefore have been very costly to the United States. *The only sound strategy was to delay the date of requisitioning as we did until rates and values could be reduced to more moderate levels.*

"Under the circumstances, the Maritime Commission determined not to resort to requisition, even after May 27, 1941, but to continue operations under private ownership *until such time as its efforts to reduce and stabilize rates and values should produce results* or the need for requisitioning should become clearer and more pressing."

"In April 1942 the War Shipping Administration ordered the requisition for use of practically the entire ocean-going merchant fleet of the United States.

"General Orders 8 and 9 were issued on May 14, 1942, and the basis of payment for vessels so requi-

sitioned was established. These orders specify a basic time charter rate of $4 per ton per month, and basic insurance values of $65 per dead-weight ton.

* * * * * *

"Generally speaking, W. S. A. rates and values approximate the levels of 1940. While they are, in some respects, higher than the rates and values prevailing in the summer of 1939, they are even more substantially lower than the levels resulting after the real scarcity of cargo space began to make itself felt in 1941."

(iv) On April 11, 1944, (Pl. Ex. 75)—

P. 464: "* * * *From 1941 to 1943,* earnings in the mining and manufacturing industry have increased nearly 50 percent over 1941 levels. During the same period *earnings in the steamship industry were reduced over 60 percent.* Whatever may be said about pre-war profits of the steamship industry, there has been so profiteering from the war itself. In fact, Pearl Harbor marked the end of high profits for this industry.

"*These results are not accidental. They reflect the persistent purpose of the Maritime Commission and the War Shipping Administration to achieve a reduction of rates* and values to moderate levels through proper exercise of the ship warrant and ship requisitioning powers in accordance with the intent of Congress that shipowners should not be allowed excessive profits in wartime. I submit that no other agency can show a more constructive job in the economic field."

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 273

AMERICAN-HAWAIIAN STEAMSHIP COMPANY AS Owner of the American Steamship HAWAIIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

---

1. The instant petition seeks review of the same judgment of the United States Court of Claims in respect of which the Government is also filing a cross-petition for a writ of certiorari.

Petitioner's position is that the just compensation to which it is entitled should be calculated at the rate of $6.00 per deadweight ton, asserted to be the "fair" market value of the use of the vessel in 1941 before the Ship Warrants Act, 55 Stat. 591, put an end to the free market. Petitioner's contentions are answered in substance by the argument of our cross-petition for a writ of certiorari

to which the Court is respectfully referred, in which we take the position that the award of the Court of Claims was excessive. However, if this Court grants our cross-petition for a writ of certiorari, it might be helpful to the Court to have the entire case before it so that it can make any disposition thereof which it may deem just. Consequently, we do not oppose the grant of this petition for a writ of certiorari, in the event that our cross-petition be granted.

2. However, should this Court deny the Government's petition, we submit that the petition herein, standing alone, does not merit review.

(a). The war-inflated market prices prevailing in 1941 to which the petitioner claims to be entitled were not the result of the kind of "free market" which produces prices "that approach * * * the 'just' compensation demanded by the Fifth Amendment." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402. It was an unbalanced market in which a seller could exact exorbitant rates from a desperate buyer. It could no longer be relied upon to reflect the normal play of free economic forces, *United States* v. *Commodities Trading Corporation*, 339 U.S. 121, 134 (separate opinion of Mr. Justice Frankfurter). The Government had the power to impose controls to terminate such distorted markets. Most losses suffered by such governmental action are of a consequential nature and not compensable. *United States* v. *Felin & Co.*, 334 U.S. 624, 645-646 (concurring opinion of Mr. Justice Reed); *Nortz* v.

United States, 294 U.S. 317, 328-330; *Perry* v. *United States,* 294 U.S. 330, 357-358. Moreover, this distorted 1941 market no longer existed in 1943, when the Government first requisitioned the bareboat use of the Hawaiian.

(b). To the extent that petitioner claims that its petition presents the novel situation that the Government had fixed the charter rates for the predominant purpose of later acquiring the use of the property affected by those orders (cf. the first question presented, Pet. 2-3, and also Pet. 21 ff.), we need only point out that petitioner previously made the same contention in prior litigation with the Government, and that it was also rejected. *American-Hawaiian S. S. Co.* v. *United States,* 85 F. Supp. 815, 829-830 (S.D. N.Y.), affirmed, 191 F. 2d 26, 28 (C.A. 2), certiorari denied, 342 U.S. 941.[1]

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

AUGUST, 1955.

---

[1] Petitioner did not seek review in this Court.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 339091 251

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional provision and statute involved	4
Statement	5
Reasons for granting the writ	18
Conclusion	31
Appendix:	
A. Statute involved	1a
B. Opinion, findings of fact and conclusions of law of the Court of Claims	4a
C. Order entering judgment—March 16, 1955	37a
D. Order denying defendant's motion for rehearing—May 3, 1955	38a
E. Note and excerpts from exhibits	39a
F. Opinion of the Court of Claims, in the *American-Hawaiian S. S. Co. title requisitioning cases*, decided July 12, 1955	41a
G. Order extending time to file petition for writ of certiorari	55a
Cases:	
American-Hawaiian S. S. Co. v. *United States*, 85 F. Supp. 815, affirmed 191 F. 2d 26, certiorari denied, 342 U. S. 941	8
American-Hawaiian S. S. Co. v. *United States*, decided July 12, 1955, by the Court of Claims	6, 30a, 41a
American-Hawaiian S. S. Co. v. *Secretary of Commerce*, Tax Court of the United States, No. 899–R	15
Cushing, The, 285 Fed. 617, modified and affirmed, 292 Fed. 561 and 268 U. S. 146	29
Kimball Laundry Co. v. *United States*, 338 U. S. 1	27

Cases—Continued Page

Lord Manufacturing Co. v. *United States*, 114 C. Cls. 199, certiorari denied, 339 U. S. 956 ... 23, 29, 31

Smith-Douglass Company, Inc. v. *United States*, 126 C. Cls. 758, certiorari denied, 348 U. S. 815 ... 6, 7

United States v. *California Eastern Line*, 348 U. S. 351 ... 15

United States v. *Commodities Trading Corp.*, 339 U. S. 121 ... 18, 21, 22, 23, 25, 29

United States v. *Cors*, 337 U. S. 325 ... 12, 29

United States v. *Felin & Co.*, 334 U. S. 624 ... 18, 21, 22, 23

United States v. *Miller*, 317 U. S. 369 ... 21

United States v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396 ... 25, 27, 29

Vogelstein v. *United States*, 262 U. S. 337 ... 18, 21

Constitution:

Fifth Amendment ... 4, 22

Statutes:

Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 53 Stat. 1255:

Section 902 ... 19, 1a

Section 902 (a) ... 4, 1a

Section 902 (c) ... 4, 5, 2a

Section 902 (d) ... 4, 5, 3a

Property Requisition Act of 1941, 55 Stat. 742 ... 23

Second War Powers Act, 56 Stat. 181:

Section 601 ... 23

Section 602 ... 23

Ship Warrants Act, 55 Stat. 591:

Section 2 ... 7, 8

Miscellaneous:

Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 Tulane Law Review, 345, 365 (1937) ... 22

Executive Order No. 9387, October 15, 1943 (8 F. R. 14105) ... 12

Miscellaneous—Continued Page
7 F. R. 6546:
Part I, C. Option I 11
Hearing before the Committee on Merchant Marine & Fisheries, House of Rep., 78th Cong., 1st Sess. (Red Sea Charter Rates), pp. 106–107, 117–118 16
Hearing before the Committee on Merchant Marine & Fisheries, House of Rep., 77th Cong., 2d Sess. (Waterman Steamship Corporation), pursuant to authority of H. Res. 281, pp. 59, 71, 76–77 10
H. Rep. No. 526, 77th Cong., 1st Sess., pp. 2–3, 5, 7 8
Maritime Commission, General Order No. 49 (Press Release No. 1117) 9
Maritime Commission, Press Release No. 970 ... 9, 16
S. Rep. No. 484, 77th Cong., 1st Sess., p. 4 8
War Shipping Administration, General Order No. 8 (7 F. R. 3678) 9, 10, 14, 16
War Shipping Administration, General Order No. 37 (9 F. R. 3806) 12

In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY AS OWNER OF THE AMERICAN STEAMSHIP *Hawaiian*

CROSS PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

On July 29, 1955, the respondent herein, American-Hawaiian Steamship Company as the owner of the American Steamship *Hawaiian,* filed a petition for a writ of certiorari (No. 273) in the above cause seeking the review of the judgment of the United States Court of Claims, entered March 16, 1955, awarding $492,607.00 plus interest as just compensation for the requisitioning of the use of respondent's vessel, the S. S. *Hawaiian.*[1]

[1] The Government is filing a memorandum in which it does not oppose the granting of American-Hawaiian's petition, should this petition be granted. This cross-petition is based on the same record as No. 273.

The Solicitor General, on behalf of the United States, prays that a cross-writ of certiorari issue to review this same judgment of the Court of Claims on the grounds set forth below.

OPINION BELOW

The opinion, findings of fact and conclusions of law, of the United States Court of Claims dated October 5, 1954 (App. pp. 4a–36a) are reported at 129 C. Cls. 365.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 16, 1955 (App. pp. 37a–38a). A timely motion for a rehearing was denied on May 3, 1955 (App. p. 38a). On July 27, 1955, the time for filing a petition for a writ of certiorari by the United States was extended by order of Mr. Justice Black to and including August 30, 1955 (App. p. 55a). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

Following the outbreak of World War II, cargo ship charter rates increased very rapidly in the unrestricted free market which existed before wartime controls were established. Once controls were placed in operation, charter rates were rolled back substantially. Under this control program, an industry wide scale of rates was developed, following negotiations between industry representatives and the Government. These

rates were subsequently accepted by a very substantial majority of American ship owners as constituting "just compensation" for the requisitioned use of their ships. Respondent owner rejected an administrative award at this prevailing rate, claiming compensation on a basis which would return the same war-inflated profits which respondent had made just prior to the institution of controls.

The questions presented are:

1. Whether the Court of Claims applied proper standards in holding that the administrative award at the rate generally accepted throughout the industry failed to accord respondent "just compensation".

2. Whether, in the circumstances of this case and in the absence of proof of any special conditions or hardships peculiarly applicable to respondent, the Court of Claims could properly award as "just compensation" an amount of rental not only 100% in excess of the generally accepted industry wide rate, but which (for less than three years use) was nearly double the undepreciated cost of respondent's vessel.

3. Whether the Court of Claims properly held that the wartime demand for shipping space and respondent's inflated wartime earnings, both prior and subsequent to the institution of Government controls, were relevant factors which should be taken into account in fixing "just compensation".

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment provides, in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

Section 902 (a) of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended in 1939, 53 Stat. 1255, 46 U. S. C. (1940 ed.) 1242 (a), provides, in pertinent part:

> Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. * * * When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. * * *.

The full text of Section 902 (a), together with the provisions of Sections 902 (c) and 902 (d) of the Merchant Marine Act of 1936, as amended, are set forth in the Appendix, *infra*, pp. 1a–3a.

STATEMENT

Respondent, the American-Hawaiian Steamship Co., brought this action in the Court of Claims under Sections 902 (c) and 902 (d) of the Merchant Marine Act of 1936, as amended, (App. pp. 2a–3a), to recover just compensation for the wartime requisitioning of the use of its cargo vessel *Hawaiian* on a "bareboat" charter basis,[2] from July 7, 1943 to May 1, 1946. Respondent sued for compensation figured at a rate of $6.00 per deadweight ton per month, having rejected an award at the Government's figure of $1.25. This $1.25 rate had been established on an industry wide basis under the wartime program of shipping controls, and was accepted as "just compensation" by a large majority of American ship owners for the bareboat requisitioning of vessels of the same general age and class as the *Hawaiian*. The Court of Claims awarded respondent judgment on the basis of a $2.50 rate (Fdg. 32, App. p. 36a).

The events which led to this litigation and to the establishment of the $1.25 rate are set forth in substantial detail in the Findings of Fact prepared by the Court of Claims (Fdgs. 1–30, App.

[2] Under a "bareboat" charter, the charterer takes full possession of the ship, runs its operations and assumes all expenses, including upkeep of the vessel (Fdg. 9, App. p. 15a). Thus bareboat charter payments constitute essentially profits and depreciation.

pp. 11a–35a). These events may be summarized as follows:

1. The *Hawaiian* is a single screw dry cargo steam freighter built in 1919, with a deadweight carrying capacity of 9,460 tons. Respondent had purchased this ship in 1925 for $375,000. Including subsequent capital expenditures, respondent's total cost of the vessel, before depreciation, was $414,669.55, or $43.83 per deadweight ton. (Fdg. 4, App. pp. 12a–13a.)

The use of the *Hawaiian* was requisitioned for a period short of three years, at the termination of which she was returned to respondent (Fdg. 1, App. p. 11a). At the rate of $2.50 per deadweight ton per month, or $30.00 a year, respondent will receive approximately $82.50 per deadweight ton, nearly double respondent's total undepreciated investment in the *Hawaiian*. This amount is likewise greater than the total value of similar overage cargo ships, as determined in litigation for "just compensation" arising from the Government having requisitioned title, rather than mere bareboat use.[3]

---

[3] In *Smith-Douglass Company, Inc.* v. *United States*, 126 C. Cls. 758, 767, certiorari denied, 348 U. S. 815, the Court of Claims awarded $66.87 per deadweight ton as just compensation for the taking of a vessel. In *American-Hawaiian S. S. Co.* v. *United States*, decided by the Court of Claims on July 12, 1955 (App. pp. 41a–54a), the court found values ranging from $76.47 to $23.15 per deadweight ton, averaging $56.12, to constitute the just compensation for the requisition of the title of generally similar dry-cargo vessels owned by respondent.

2. *Events preceding the requisitioning of vessels on a bareboat charter basis.* Prior to World War II there had been an over-supply of shipping throughout the world and particularly in the United States. This situation, however, changed rapidly with the outbreak of hostilities in Europe as a result of a combination of circumstances, such as sinkings,[4] the rapidly increasing needs of the belligerents, and the improvement of business conditions in the United States. Shipping space thus became scarce, and the earnings of carriers rose sharply, due to the more efficient use of the vessels as well as increases in rates. (Fdg. 7, App. p. 14a.) By the summer of 1941 time charter[5] rates had reached the level of $7.50 a deadweight ton per month (Fdg. 16, App. p. 21a).

In July 1941, Congress passed the Ship Warrants Act, 55 Stat. 591, Section 2 of which au-

[4] By the end of 1941, 2,612 dry cargo ships had been lost by the allied powers and by neutrals; by the middle of 1941 the excess of sinkings over new construction amounted to 1,775 vessels. See *Smith-Douglass Company, Inc.* v. *United States*, 126 C. Cls. at 762.

[5] Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses, and also for war risk insurance of the vessel (Fdg. 9 (a), App. p. 15a). Since under the usual bareboat charter the charterer has full possession and operation of the vessel and pays all expenses, including upkeep (Fdg. 9 (a), App. p. 15a), bareboat charter rates are roughly the equivalent of time charter rates minus operating expenses.

thorized the Maritime Commission to issue warrants to vessels entitling them to certain privileges and authorities, provided their owners agreed to abide by the rulings of the Maritime Commission relating to priorities of cargoes and "the fair and reasonable maximum rate of charter-hire." In enacting the statute Congress recognized that it was—

> * * * essential in the national interest * * * that priority be given to the transportation of commodities which are essential in the national interest over those which we could do without, notwithstanding the fact that higher rates may be secured for the transportation of many nonessential cargoes * * * [and] that transportation be performed on an equitable basis consistent with the costs involved *to prevent a spiraling increase of transportation charges,* thereby *threatening* the present system of tariffs and rate structures and *adversely affecting* our *national-defense program* as well as our *domestic economy.* [Emphasis added.] [H. Rep. No. 526, 77th Cong., 1st Sess., p. 2–3 (see also pp. 5, 7), S. Rep. No. 484, 77th Cong., 1st Sess., p. 4.]

The Ship Warrants Act thus constituted one of the earliest, if not the earliest instance of World War II legislation dealing with priorities, allocations, and price controls.[6]

[6] In *American-Hawaiian S. S. Co.* v. *United States*, 85 F. Supp. 815, 829–830 (S. D. N. Y.), affirmed, 191 F. 2d 26, 28 (C. A. 2), certiorari denied, 342 U. S. 941, the court rejected

On July 30, 1941, the Maritime Commission issued its Press Release No. 970 (Pl. Ex. 41) announcing that time charter rates of vessels of the *Hawaiian's* type and tonnage were to be reduced from $7.50 to $4.60, *i. e.,* by about 35% (Fdg. 21(a), App. p. 24a). This release contained recitals to the effect that the new scale was issued to prevent inflationary influences on commodity prices, and that agreement on these rates had been reached with American flag ship operators on a voluntary basis. Ship warrants were denied to operators of vessels who refused to abide by the maximum charter rates (Fdg. 20, App. p. 23a). Further changes were announced in January, 1942.[7] After substantial protests were made against some of the new rates, various readjustments were allowed (Fdg. 22, App. pp. 25a–26a) and these adjusted rates were accepted by "a substantial majority" of the shippers (Fdg. 18, App. p. 22a). During this time it was becoming progressively

---

respondent's claim that the regulations under the Ship Warrants Act were imposed solely for the purpose of requisitioning vessels at a reduced value and held that "[the] Ship Warrants Act and the Regulations issued thereunder were part of an anti-inflation program and were also designed to speed the transportation of essential war materials."

[7] On January 5, 1942, the Maritime Commission issued its General Order No. 49 (Press Release No. 1117) which reduced the maximum time charter rates by another 28 per centum, *i. e.*, to $3.35 for ships like the *Hawaiian*, effective January 20, 1942 (Fdg. 21 (c), App. p. 24a). General Order No. 49, however, was of little, if any, practical importance since it was shortly superseded, after protests from the industry, by the higher rates contained in War Shipping Administration, General Order No. 8 (Fdgs. 22–23, App. pp. 25a–26a).

difficult to operate without acceptance of the Government's rate schedule (Fdg. 18, App. p. 22a).

In April 1942, the War Shipping Administration, which had been assigned the operating, chartering and requisitioning functions previously exercised by the Maritime Commission under the Merchant Marine Act of 1936 and the Ship Warrants Act, requisitioned all American cargo vessels on a time charter basis (Fdgs. 21, 23, App. pp. 23a, 26a). On May 14, 1942, this agency issued its General Order No. 8 (7 F. R. 3678) pursuant to which time charter rates for a vessel of the *Hawaiian's* type and tonnage were $4.35 per deadweight ton per month (Fdg. 26, App. p. 28a).

Prior to the issuance of General Order No. 8, the War Shipping Administration held a meeting with representatives of the shipping companies, including respondent, at which the proposed rates were explained and discussed with the industry (Fdg. 25, App. pp. 27a–29a). The Administration proposed a rate of $4.10 based upon a bareboat factor of $1.00 designed to represent profit and depreciation[8] plus $3.10 to cover operating expenses[9] (Fdgs. 24–25, App. pp. 26a–29a). At the request of the industry, the War Shipping Administration increased this rate by 25¢ (Fdg. 25,

---

[8] Cf. testimony of D. F. Houlihan, Deputy Administrator of Fiscal Affairs, War Shipping Administration, Hearing before the Committee on Merchant Marine and Fisheries, House of Representatives, 77th Cong., 2d Sess. (Waterman Steamship Corporation), pursuant to authority of H. Res. 281, p. 59 (D. Ex. 14A–B).

[9] *Ibid.*, pp. 71, 76–77.

App. pp. 27a–28a), and also raised the expense allowance for overhead [10] (Fdg. 24 (b), App. p. 27a), although Government representatives had suggested requisitioning title to the vessels, if a "low enough" rate were not generally accepted (Fdgs. 25–26, App. pp. 27a–29a). Industry representatives who were present at the meeting recommended acceptance of these rates (Fdg. 25, App. pp. 27a–29a), and compensation tendered on the basis of these rates was ultimately accepted by seventy-nine owners, including respondent, of the 390 large overage dry cargo vessels which the Government requisitioned on a time charter basis (Fdgs. 25–26, App. pp. 28a–29a). Although the requisition time charter provided that it could be revised every 120 days (Part I, C. Option I, 7 F. R. 6546), no owner availed himself of the privilege to ask for a readjustment of these rates (D. Ex. 8, 8A; see App. pp. 39a–40a).

3. *The establishment of bareboat charter requisition rates.* A serious defect inherent in the time charter rates was the circumstance that the

[10] Cf. the testimony of Joseph M. Quinn, Comptroller of the War Shipping Administration, at pp. 1044 and 1045 of the transcript:

A. * * * In our determination we have used a rate of overhead of $100 a day.

By Commissioner VANCE:

41Q. Per vessel?

A. Per vessel. There was quite a discussion that that was inadequate; that, naturally, with the war on, the administrative expenses were going up. We recognized that. The industry thought the rates should be $150 a day. We agreed on $125 a day. * * *

expenses of running the vessels and overhead fluctuated widely, resulting in considerable variations in the assumedly uniform $1.00 bareboat factor (Fdg. 24 (b), App. p. 27a). Consequently, in 1943, most requisition charters were changed to charters on a bareboat basis (Fdg. 27, App. pp. 29a–30a), under which the Government as charterer paid all the operating expenses, so that the new charter rate paid the owner represented essentially profits and depreciation [11] (Fdg. 9 (a), App. p. 15a).

Schedules of compensation for the bareboat charter requisitions were issued on April 7, 1944 in War Shipping Administration General Order No. 37 (9 F. R. 3806) (Fdg. 27, App. pp. 29a–30a), in which the rate for a vessel of the tonnage and age of the *Hawaiian* was fixed at $1.25 per deadweight ton per month (Fdg. 28, App. p. 30a). The General Order recited in its findings that its "rates conform[ed] with the standards, rules and formulae of general application established by the Advisory Board on Just Compensation (Executive Order No. 9387, October 15, 1943, 8 F. R. 14105) in its report of December 7, 1943." [12]

In determining the proper bareboat charter rate the War Shipping Administration was governed essentially by two factors. First, it sought

[11] See fn. 2, *supra*, p. 5.

[12] The Board consisted of Circuit Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr., Executive Order 9387, 8 F. R. 14105. Cf. *United States* v. *Cors*, 337 U. S. 325, 330–331.

to establish the average "amount of adjusted earnings under current [time] charters", and, second, a sum sufficient to provide (i) adequate annual depreciation on the valuation of those vessels, and (ii) a reasonable return on such valuation (Fdg. 28, App. p. 31a).

(a) The time charter rates had been based upon average expenses amounting to approximately $3.00, designed to leave the operator a bareboat factor (profit plus depreciation) of $1.25 per deadweight ton per month (*supra,* pp. 10–11). An analysis of the operation of the time charters disclosed that the average operating expenses plus overhead actually left the owners an average amount of adjusted earnings of $1.275 per deadweight ton per month (Fdg. 29, App. pp. 32a–33a). Earnings realized on particular vessels were not taken into account, since the effective utilization of ships in furthering the war effort had necessitated using some ships in areas where there were fewer opportunities for profit (Fdg. 29, App. pp. 32a–33a).

(b) In connection with the second factor, the War Shipping Administration found that the average value of pre-1935 large dry cargo vessels was $75.00 per deadweight ton in April, 1942,[13]

[13] Thus the War Shipping Administration in fact made substantial provision for an increase in the market value of the twenty-five year old *Hawaiian*, which, as noted, *supra* p. 6, had been bought by respondent, in 1925, at a gross cost, including subsequent improvements and before depreciation, of $43.83 per deadweight ton.

and that their annual rate of depreciation amounted to 12½%; hence, that by April, 1944, their value had been reduced to $56.25 per deadweight ton. It also found that the rate of $1.25 per deadweight ton per month, i. e., $15.00 a year, would provide to the owners $5.625 as profits (10% on the $56.25 investment) and $9.375 depreciation (12½% on the vessel's 1942 value). (Fdg. 30, App. pp. 33a–35a.)

It thus appeared that the rate of $1.25 would yield to the owners on the average as much as they had earned under the earlier time charters, and at the same time would provide them with an income of 10% of the value of their property plus 12½% depreciation.

This rate of $1.25 per deadweight ton per month was accepted by about four-fifths of the owners concerned. Thirty-seven owners of over 122 overage large dry-cargo vessels, having a tonnage of about 920,000 deadweight tons, accepted bareboat charters at the rate of $1.25. The rate was rejected by respondent which owned sixteen vessels, including the *Hawaiian*, with a deadweight tonnage of approximately 170,000, and by four other owners of six vessels with a combined tonnage of [redacted] less than 40,000 (D. Ex. 8, 8A; see App. pp. 39a–40a.)[14]

[14] Note the Commissioner's Finding No. 32 (Pet. No. 273, O. T. 1955, at pp. 70–71) that the $1.25 rate was identical with the $1.00 bareboat charter component and 25¢ additional allowance of the time charter rates under General Order No. 8 (*supra*, pp. 10–11) which had been generally accepted by the industry, including respondent (*supra*, p. 11).

4. *Respondent's operations.* Prior to the Fall of 1939, respondent was engaged essentially in the intercoastal trade. In those operations, its earnings per deadweight ton per month (before overhead, depreciation, and taxes) amounted to $1.29 in the last quarter of 1939,[15] to $2.23 in 1940, and to $3.27 in 1941 (Fdg. 10, App. p. 16a). After the outbreak of World War II, respondent entered the field of foreign trade and engaged, among others, in the Red Sea operations which recently were before this Court in *United States* v. *California Eastern Line,* 348 U. S. 351 (Fdg. 10, App. pp. 16a–17a). Respondent's early wartime earnings from its foreign trade operations were found to be "typical of the earnings" generally realized prior to the general requisitioning of American shipping in April 1942 (Fdg. 12, App. p. 18a). These earnings reached peak levels in June 1941, and thereafter declined as the result of the passage of the Ship Warrants Act (Fdgs. 12, 16, App. pp. 18a, 21a).

According to figures submitted by respondent in renegotiation proceedings,[16] the average cost

---

[15] Thus, allowing for overhead at $100.00 per vessel a day or 32¢ per deadweight ton per month (see fn. 10, *supra*, p. 11), the earnings amounted to approximately $1.00 a deadweight ton per month during the early months of the war.

[16] *American-Hawaiian S. S. Co.* v. *Secretary of Commerce, as successor to the United States Martime Commission,* in the Tax Court of the United States, No. 899–R. Respondent's petition submitted in that proceeding is D. Ex. 26 in the instant case.

of its combined Red Sea Voyages amounted to $2,601,544.40, on the 425,027 deadweight ton months involved, *i. e.*, to about $6.12; its profits before taxes to $769,675.46, *i. e.*, to $1.81 per deadweight ton per month.[17] After respondent's application for ship warrants was denied because it did not agree to abide by the prescribed "Uniform Conditions", including the maximum shipping rates published in Press Release No. 970, *supra*, p. 9 (Fdg. 20, App. p. 23a), respondent voluntarily chartered some of its vessels to the Maritime Commission for about a year beginning in October, 1941, at the Commission prescribed rates (Fdg. 11, App. pp. 17a–18a; see also Red Sea Charter Rates, Hearings before the Committee on the Merchant Marine & Fisheries, House of Representatives, 78th Cong., 1st Sess. (D. Ex. 4), pp. 106–107, 117–118). According to the figures submitted in the renegotiation proceedings mentioned above (*supra*, pp. 15–16), the *Hawaiian* had operating expenses of $3.00 and profits amount to $1.57 per deadweight ton month.[18] The expenses under those contract charters of the *Hawaiian* thus were substantially similar to the figures which constituted the basis for the time charter rates established under General Order No. 8 (*supra*, pp. 10–11).

[17] D. Ex. 26, p. 36; App. p. 40a–1.

[18] D. Ex. 26, p. 37; App. pp. 40a–2, 3. The operating expenses amounted to $129,367.24, the profits before taxes to $67,811.37. The *Hawaiian* traveled 43,028 deadweight ton months.

As above noted (*supra,* p. 11), respondent, as the other owners of large overage dry-cargo vessels, agreed with, or acquiesced in, the time charter requisition rates of $4.35 a deadweight ton per month, and did not request a revision of those rates although permitted in the charter. According to the figures submitted by respondent in its renegotiation proceedings, the average expenses of all its vessels under requisition time charters amounted to about $2.40 per deadweight ton month and their average profits to $1.57.[19] Figures prepared in the renegotiation proceedings show that during the last two trips of the *Hawaiian* on a time charter[20] the operating expenses before depreciation and overhead for that particular vessel amounted to $2.93. Allowing for overhead at the rate of $125.00 a day (fn. 10, *supra,* p. 11), or approximately 40¢ per deadweight ton month,[21] the *Hawaiian* thus earned about $1.00 per deadweight ton month before depreciation and taxes on those two trips under the $4.35 requisition time charter rates.

During the instant proceedings, however, respondent introduced figures for the operation of the *Hawaiian* which were totally at variance with

---

[19] D. Ex. 26, p. 38; App. p. 40a–4. Operating expenses: $5,801,176.74; profit before taxes: $3,772,499.76; deadweight ton months: 2,415,281.

[20] D. Ex. 34, 34A; see also transcript, p. 1648.

[21] $125.00 a day amounts to $3,750.00 a month, or in the case of the *Hawaiian* with a capacity of 9,460 deadweight tons to 40¢ per deadweight ton per month.

the data for whose accuracy it had vouched in its verified renegotiation petition (D. Ex. 26, p. 23). Here respondent took the position that the operating expenses of the *Hawaiian* under the time charter amounted not to $2.93 but merely to $1.89, and that 17¢ constituted an adequate allowance for overhead (Fdg. 29, App. pp. 32a–33a).

Respondent's claim in this litigation that the fair market price for the use of the *Hawaiian* on a bareboat charter amounts to $6.00 per deadweight ton per month, is apparently based on the $7.50 time charter rate prevalent in the summer of 1941 prior to the enactment of the Ship Warrants Act, with an allowance of $1.50 for operating expense and overhead.

REASONS FOR GRANTING THE WRIT

In rejecting the administrative award of the generally accepted industry wide charter rate, in the total absence of any peculiar hardship, and in allowing respondent an excessive rate of return for the Government's wartime use of its ship, the Court of Claims has reached a decision which is directly contrary to the principles heretofore established by this Court in *United States* v. *Commodities Trading Corporation,* 339 U. S. 121; *United States* v. *Felin & Co.,* 334 U. S. 624; and *Vogelstein* v. *United States,* 262 U. S. 337. The issues raised are substantial. They are of wide and permanent importance and call for review by this Court.

1. The importance of these problems, relating to the proper standards to be used in determining "just compensation" for emergency requisitions of property in the absence of a free market, is not limited to the instant case. There are now pending in the Court of Claims twenty-one companion cases involving twenty-one vessels of a combined deadweight tonnage of approximately 190,000 tons. The potential liability of the United States under these cases approaches $10,000,000.00 [22] and will be governed largely by the outcome of this case. Section 902 of the Merchant Marine Act of 1936 is still in effect, and its proper interpretation is a matter of general and constant importance. In addition, the questions raised here are not unique, but may and do arise under the various condemnation and requisition provisions utilized by the Federal Government.

2. In contrast with controlling decisions of this Court, and of its own earlier decisions, the court below failed to recognize that (a) the $1.25 bareboat charter rate based upon substantial agreement between the War Shipping Administration and the industry, constituted the market price, and, hence, the proper measure of just compensation;

[22] If the average period of requisition on a bareboat charter basis amounted to 2½ years (somewhat less than in the instant case), the liability of the United States above the administratively determined rate would amount to more than $7,000,000 (190,000 by 1.25 by 30). Interest on the judgment below added about 40% to the recovery (App. p. 37a).

and (b) in any event the general acceptance of the $1.25 rate by the overwhelming majority of the industry constituted well nigh conclusive evidence that the administrative award was "just".

(a) As shown above (*supra*, pp. 13–14), the $1.25 bareboat charter rate was actually a continuation of the time charter rate agreed upon between industry representatives and the War Shipping Administration.[23] Respondent's representative attended the meeting at which the time charter rates were determined, although it is not certain whether he expressly consented to them (Fdg. 25, App. 27a–28a). However, respondent accepted these rates as did the industry generally (Fdg. 26, App. p. 29a). Moreover, when the time requisition charters were changed to bareboat charters, without effecting any material change in the compensation received by the owners of the vessel,[24] thirty-seven shipping companies owning 122 vessels with a capacity of 920,000

[23] The $4.35 time charter rate was based upon an expense factor of approximately $3.00, a bareboat factor of $1.00, and a special allowance of $.25 added at the request of the industry, *supra*, p. 10, and Finding of Fact No. 25 (App. pp. 27a–28a). When for reasons of fairness the bareboat charters were substituted for time charters and the War Shipping Administration assumed all operating expenses, the expense factor could be dropped, leaving a bareboat charter rate of $1.25.

[24] As already shown, *supra*, p. 17, respondent in its verified petition in the renegotiation proceedings admitted that the expenses of the *Hawaiian* coincided with the $3.00 expense factor underlying the computations of the War Shipping Administration.

deadweight tons accepted the $1.25 rate. The award was rejected only by respondent and four other companies owning six vessels having a capacity of 32,000 deadweight tons (*supra*, p. 14).

The $1.25 bareboat charter rate was thus merely the outgrowth of a rate agreed upon initially in negotiations with the industry in which respondent participated and which was accepted by the entire industry, including respondent, for a full year, and which in a modified, but substantially unchanged, form continued to be the basis of the overwhelming majority of the dealings between the War Shipping Administration and the industry.

The facts are thus virtually indistinguishable from *Vogelstein* v. *United States*, 262 U. S. 337, 339, holding that where a price had been agreed upon between the Government and the industry and formed the basis of virtually all transactions in that industry, and where, as here, the claimant had participated in a meeting designed to carry out that agreement, the agreed price constituted the market price.[25] Of course, it is well established that the market price is the maximum measure of just compensation. *United States* v. *Miller*, 317 U. S. 369, 374; *United States* v. *Commodities Trading Corporation*, 339 U. S. 121, 123.

---

[25] See also the observation of Mr. Justice Reed in *United States* v. *Felin & Co.*, 334 U. S. 624, 645, that the prevailing price in a controlled market constitutes "just compensation."

(b) If we assume, however, for the sake of argument, that the compensation rates determined by the War Shipping Administration could not be considered the equivalent of a free market price, their general acceptance by the industry still had a highly probative value in determining what constitutes "just" compensation, to which the owner of property taken for public use is entitled under the Fifth Amendment.

As this Court pointed out in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123, 124, the term "just" implies ideas of fairness and equity; it means a compensation which is "just" to the owner as well as the public. "Just compensation is a practical conception"; the question whether compensation paid in a particular industry is "just" "cannot be torn from the context of that industry", and must be determined "in the light of the governing facts of the industry". *United States* v. *Felin & Co.*, 334 U. S. 624, 631, 632, 641.

The acceptance of a rate of compensation by the overwhelming majority of a particular industry [26] thus constitutes highly convincing evi-

[26] The "just price", a concept closely related to that of "just compensation", was determined by the "*communis aestimatio*" of the informed and reputable members of the community. Cf Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 Tulane Law Review, 345, 365 (1937).

dence that the compensation was "just".[27] Cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 635–636. In *Lord Manufacturing Co.* v. *United States*, 114 C. Cls. 199, 269, 270, certiorari denied, 339 U. S. 956, the court below accorded highly probative, if not conclusive, effect to the circumstance that the proffered compensation had been accepted by the claimant's competitors.

3. The decision below disregarded the administrative determination of just compensation on the grounds that no presumption of correctness or fairness could apply to a rate applicable indiscriminately to all vessels of a certain class (Opinion, App. p. 8a; cf. Fdg. 30, App. pp. 33a–35a), and that it was not possible to conclude from the evidence that the rate of $1.25 was the rate which would probably result from fair negotiations between a willing owner and a willing charterer (Fdg. 31, App. p. 36a). These rulings are likewise inconsistent with the controlling decisions of this Court.

In *United States* v. *Felin & Co.*, 334 U. S. 624, which interpreted the analogous provisions of the Property Requisitioning Act of 1941,[28] the opinion

[27] According to Finding of Fact No. 12 (App. p. 18a), respondent's earnings were typical of those earned in the industry. Thus, it cannot be said that the rate, although generally "just", gave rise to hardship in respondent's case. Cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 134.

[28] 55 Stat. 742, 50 U. S. C. App. (1940 Ed., Supp. IV) 721, as amended by the Second War Powers Act, Title VI, Sections 601, 602, 56 Stat. 181, 50 U. S. C. App.

of Mr. Justice Frankfurter[29] pointed out (at p. 631) that the gist of this type of action is

> to recover damages which the respondent would suffer * * * if it accepted the Government's offer of the applicable ceiling prices in satisfaction of "just compensation." The burden therefore rests on the respondent to prove the damages it would suffer by not receiving more than the ceiling prices. *Marion & Rye Valley R. Co.* v. *United States*, 270 U. S. 280, 285.

And again (at pp. 640–641), the opinion states:

> When due regard is given to the findings of the Court of Claims, they fail to establish that the compensation proferred by the Government * * * falls short of "just compensation."
>
> * * * * *

(1940 Ed., Supp. IV) 636, 636a. The Act provided in substance that in the case of a requisitioning the President would "determine the amount of the fair and just compensation" * * * "in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States." If the owner of the property was unwilling to accept the award as full and complete compensation, he was to be paid 50% thereof and was authorized to sue under the provisions of the Tucker Act for the difference between the 50% received by him and the sum which he considered just compensation.

[29] The opinion of Mr. Justice Frankfurter had the concurrence of Chief Justice Vinson and of Mr. Justice Burton. The separate concurring opinion of Mr. Justice Rutledge expressly agrees with it on the point (pp. 647–648). The concurring opinion of Mr. Justice Reed, concurred in by Justices Black and Murphy, does not seem to disagree with this basic aspect of the opinion of Mr. Justice Frankfurter.

> The burden of proving its case was upon the respondent. The nature of this burden was to prove, in light of the governing facts of the industry, that the administrative award for the taking of respondent's property was less than just compensation * * *.

In *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 406, and again in *United States* v. *Commodities Trading Corporation*, 339 U. S. 121, 128, this Court reaffirmed the rule that the owner of requisitioned property who rejects a proffered award has the burden of establishing that the award as applied to him constituted less than "just compensation".

Respondent has not sustained this burden, and the court below has not made any findings showing that it has been sustained. To the extent that the $1.25 rate was based upon a valuation of the vessels, and an allowance for 12½% depreciation and 10% profits, the court below rejected it merely on the ground that it was uniform and hence presumptively unfair (App. p. 8a). It did not find, as required by the controlling decisions of this Court, that respondent was injured by that award because the *Hawaiian* was worth more than assumed by the War Shipping Administration or that the percentage allowances for depreciation and profits were inadequate. The same fatal error appears in Finding of Fact No. 31 (App. p. 36a), stating that "it *is not possible to conclude from the evi-*

dence that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire * * *." [Emphasis added.] It was not up to the Government to prove that its award amounted to just compensation; the burden was upon respondent to establish that it had received less than the Constitution requires.

In addition, the court below seems to have assumed that the rate of $1.25 was inadequate because under the requisition time charters respondent supposedly had earned $2.46 per deadweight ton per month before overhead, depreciation and taxes (Opinion, App. p. 9a). The $2.46 earning figure used by respondent in this proceeding, however, stands in startling contrast to the data, almost identical with that used by the War Shipping Administration, which respondent introduced in its renegotiation proceedings (*supra,* pp. 15–16, 17–18). Above all, however, the court did not explain why respondent would have received less than just compensation if its claimed high earnings were reduced to the industry average.

The court below did not find that these alleged above-average earnings were the result of any physical features of the *Hawaiian* which increased its profits or reduced the cost of its operations. To the extent such earnings may have existed, they were presumably attributable to respondent's managerial skill in operating the *Hawaiian* in a

highly efficient manner. This superior business skill, however, differs from, and does not enhance, the value of the vessel. *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.,* 338 U. S. 396, 403, fn. 6. If the *Hawaiian* were sold or chartered on a bareboat basis its earnings would depend exclusively on the new operator's acumen and respondent's past activities would be immaterial. As this court pointed out in *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 9–10, the managerial efficiency "which has had only the effect of increasing current income or reducing expenses of operation" spends itself as it is being exerted. It does not create a "transferable momentum" of value to a potential customer which would reflect in the price he would be willing to pay. The managerial skill of efficiently operating a vessel at a high rate of profits thus does not create anything of a transferable value, for which compensation has to be paid. *Kimball Laundry Co.* v. *United States,* 338 U. S. at 5, 9–11, 16, 20; cf. *United States* v. *Toronto, Hamilton & Buffalo Nav. Co., supra.*

The correctness of the rule established by this Court that an administrative award may be set aside only upon a positive showing that it does not constitute just compensation is also evidenced by the method by which the court below sought to determine on its own what was just in the circumstances. Here the Court of Claims, more than ten years after the events, overturned an admin-

istrative award which had been made as the result of painstaking investigations (Fdgs. 28–34, App. pp. 30a–35a), and which had been accepted as just by the vast majority of the industry at the time and in the circumstances in which it was made. The court below could not pinpoint any specific defect in the determination of the administrative award which could have served as the vantage point for a correct new award, but rather objected to the uniformity of the rates. Its explanation of its own method of determining what it considered just compensation, however, shows flaws far more serious than those of which it accused the War Shipping Administration.

The court had to concede that none of the factors considered by it gave any satisfactory basis for a determination of "just compensation" (Opinion, App. p. 10a), which, in any event, was not capable of measurement with mathematical exactness (Fdg. 32, App. p. 36a), and hence was at best a guess. The data evaluated by the court below were disclosed only in part in its Opinion and Findings of Fact (App. pp. 10a, 36a), and at least some items were not of record but were taken into consideration only by way of undisclosed judicial notice. In no instance did the Court of Claims attribute any specific value or weight to any of the factors upon which it based its determination of just compensation.[30]

[30] The decision is thus based in part upon factors which are qualitatively and quantitatively unknown and which are not in this record.

This method of determining just compensation is more likely to lead to serious mistakes than the one used by the War Shipping Administration. This Court has disapproved similar decisions of the court below based upon haphazard calculations and judicial compromises (*United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 127) which left "too much temptation for unbridled speculation even by experienced judges" (*United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396, 408).

4. The $2.50 rate awarded by the court below was patently unjust to the public. While the "political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice" (*United States* v. *Cors*, 337 U. S. 325, 332), the owner of property need not be compensated for the loss of profits he could have made as the result of the spiraling prices resulting from the distorted free market in war time conditions. *United States* v. *Cors*, 337 U. S. 325, 333; *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 133 (concurring opinion of Mr. Justice Frankfurter). "Just" compensation implies a *fair* market value, not a hold-up value,[21] nor what the traffic will bear.[22]

[21] *United States* v. *Cors*, 337 U. S. 325, 334.

[22] *Lord Manufacturing Co.* v. *United States*, 114 C. Cls. 199, 270, certiorari denied, 339 U. S. 956. See also the remark of Mack, J., in *The Cushing*, 285 Fed. 617, 619 (S. D. N. Y.), modified and affirmed, 292 Fed. 561 (C. A. 2) and 268 U. S. 146, that "the shipowners had no vested right to earn profits from the war necessities".

Under the $2.50 rate, the owner, for the requisitioned use of an overage, twenty-four years old, vessel for a period of less than three years, received an amount exceeding the values of similar overage vessels determined by the same court in the title requisitioning cases involving ten of respondent's ships. *American Hawaiian S. S. Co.* v. *United States,* decided July 12, 1955 (App. pp 41a–54a). Moreover, respondent's earnings under the $2.50, or $30.00 per annum, rate are obviously excessive. If we take respondent's undepreciated cost of the *Hawaiian,* including all capital expenditures ($43.83 per deadweight ton, *supra,* p. 6), the industrywide $1.25 rate gives respondent a profit of 35% annually and the $2.50 rate gives an annual profit of 70%.[33] If we accept the valuation basis of the War Shipping Administration,[34] i. e. $75.00 per deadweight ton in 1942, depreciated to $56.25 in 1944 (Fdg. 30, App. pp. 30a–31a), respondent's annual percentage profit at the $1.25 rate is 26% and at the $2.50 rate is 51%. Taking valuations of $60.00, $70.00 and $75.00 per deadweight ton, the annual profit rate would be 25%, 21%, and 20%, respectively, at the $1.25 rate and

[33] Since the *Hawaiian* had been almost fully depreciated on respondent's books by the end of 1943 (Fdg. 4, App. p. 13a), substantially the entire amount awarded constitutes profit.

[34] As shown above, pp. 23–25, respondent had the burden of showing that those figures were inadequate.

50%, 43%, and 40%, respectively, at the $2.50 rate erroneously used below.

Even if we assume for the sake of argument that the *Hawaiian* was worth $80.00 per dead-weight ton—a figure higher than any awarded by the court below for a vessel of that type and age [35]—respondent's annual profit at the $2.50 rate would be 37½%. In 1949, at a time when war conditions were closer to its memory, the Court of Claims held that a price formula allowing a claimant 10.5% profits and almost unanimously accepted by the nation's businessmen constituted just compensation. *Lord Manufacturing Co.* v. *United States,* 114 C. Cls. 199, 269–270, certiorari denied, 339 U. S. 956. These considerations are still valid. Awards which permit earnings nearly four times above this commonly accepted standard are manifestly "unjust to the public."

CONCLUSION

It is respectfully submitted that this petition for a cross-writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
GRAY THORON,
Assistant to the Solicitor General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

AUGUST 1955.

[35] *Supra*, p. 6, fn. 3.

APPENDIX

A. Statute Involved

Section 902 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended by the Act of August 7, 1939, 53 Stat. 1254, 1255, 46 U. S. C. (1940 ed.) 1242, provides (omitting subsections (b) and (e) which are not here material):

> Sec. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for

reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * *

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this sub-

section, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

* * * * *

B. Opinion, Findings of Fact and Conclusions of Law

In the United States Court of Claims

No. 48758

(Decided October 5, 1954)

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, AS OWNER OF THE AMERICAN STEAMSHIP *HAWAIIAN*, v. THE UNITED STATES

OPINION

Whitaker, *Judge*, delivered the opinion of the court:

The issue presented in this case is the just compensation to which the plaintiff is entitled for the taking by defendant, under a bareboat charter, of the possession and use of the American steamship *Hawaiian* during the period from July 7, 1943, to May 1, 1946.

Plaintiff says that it is entitled to a rate of $6.00 per deadweight ton per month throughout the requisition period, less the amounts already paid by defendant on account, plus interest, as a part of just compensation, at the rate of 4 percent per annum on each monthly installment beginning August 1, 1943, and continuing to the date of payment of the judgment herein, subject to certain adjustments.

Defendant says that the "bareboat requisition rate" should not exceed that fixed by the War Shipping Administration, which was $1.25 per deadweight ton per month, plus appropriate allowances for the *Hawaiian's* deadweight tonnage and speed.

The *Hawaiian* was a steam freighter built in 1919, of 9,460 deadweight tons, and with a speed in excess of 12 knots. Her particulars are further described in finding 4.

On July 7, 1943, the War Shipping Administration, acting pursuant to section 902 (a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 2015, as amended, 46 U. S. C. § 1242, requisitioned the *Hawaiian* on a "bareboat" basis. It re-

tained possession and use of the vessel until it was redelivered to plaintiff on May 1, 1946.

On July 31, 1944, approximately a year after the requisition, the War Shipping Administration tendered plaintiff a bareboat form of charter party for the *Hawaiian* containing, *inter alia*, an offer of hire at the rate of $12,108.80 per calendar month. This was at the rate provided by War Shipping Administration General Order No. 37, issued April 7, 1944, which fixed a basic rate of bareboat charter hire for dry cargo vessels built during the period 1914–1934 at $1.25 per deadweight ton per month, plus certain allowances for vessels having speeds equal to or in excess of 10½ knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, the sum of the basic rate established by General Order No. 37, plus an additional 3 cents allowed for vessels with speeds exceeding 10½ but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots, she was entitled under General Order No. 37 to 6 cents, instead of 3 cents, in addition to the basic rate of $1.25 per deadweight ton per month.

On August 24, 1944, plaintiff declined to accept either the form of charter or the rate of hire offered. As required by section 902 (d) of the Merchant Marine Act of 1936, *supra*, defendant made monthly payments to plaintiff, between March 24, 1944, and August 16, 1946, aggregating $307,079.74 for the use of the *Hawaiian*. The aggregate amount of these payments on account is equivalent to hire at the rate of 96 cents per deadweight ton per month for the bareboat requisition period, or 75 per cent of hire at the rate of $1.28 per deadweight ton per month.

Plaintiff sues to recover hire at the rate of $6.00 per deadweight ton per month, less the amount already received by plaintiff on account, or net compensation of $5.04 per deadweight ton per month for the bareboat requisition period of 33 months, 25 days, 5 hours, and 10 minutes, plus interest as a part of just compensation for defendant's delay in payment.

In determining what is just compensation, each case must be decided upon its individual facts, although the courts are guided to their conclusions by certain broad principles, well known, often quoted, and often difficult of application in

specific instances. *Dore* v. *United States*, 119 C. Cls. 560, 581. Just compensation has been defined as "the sum which, considering all the circumstances—uncertainties of the war and the rest—* * * would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.*, v. *United States*, 265 U. S. 106, 123–124; *Olson* v. *United States*, 292 U. S. 246, 257. This is but another way of saying that fair market value, where there is a free market, is the usual standard of just compensation. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123; *Olson* v. *United States*, *supra*, p. 255; *Monongahela Navigation Co.*, v. *United States*, 148 U. S. 312, 326; *Boom Company* v. *Patterson*, 98 U. S. 403, 407. Where, for any reason, property has no market, resort must be had to other data to ascertain its value, although this "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." *United States* v. *Miller*, 317 U. S. 369, 374. The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a "reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases*, 230 U. S. 352, 434." *Standard Oil Co., of New Jersey* v. *Southern Pacific Co.*, 268 U. S. 146, 156.

There was no free market for the use of large, oceangoing, American-flag freighters such as the *Hawaiian* at the time of her taking on bareboat basis on July 7, 1943. In April 1942, the use of all such privately owned vessels had been requisitioned on time charter basis by the War Shipping Administration. From that time, if not before, there was no free market for the use of the *Hawaiian*. The court must, therefore, base its determination on other data, even though the inquiry may involve what is "at best, a guess by informed persons." *United States* v. *Miller*, *supra*, p. 375.

The requirement of the Constitution is that the Government must pay for property it takes a compensation which is "just." By that is meant, of course, what is just to the owner and to the Government. Justice is no absolute term. It frequently requires give and take. For one to demand all that the law allows may do injustice to the other. Shylock, in Shakespeare's *Merchant of Venice*, was entitled under the law to his pound of flesh, but, as we see it today, it would

have been an injustice for him to have taken it. Justice is a nice balance of the equities.

This was not so under the old common law of England; but equity intervened to ameliorate the rigors of the law. When our Constitution was adopted, and today, justice means the law tempered by the principles of equity.

Plaintiff says that the level of earnings realized by owners from the use of freighters such as the *Hawaiian* from the carriage of commercial cargo some months prior to the general requisitioning in April 1942 could have been realized by plaintiff throughout the bareboat requisition period if the *Hawaiian* had not been taken by defendant, but had remained in plaintiff's possession and control.

This is unrealistic. The country was at war. Various and sundry controls had been established that affected the use of plaintiff's vessel. Controls authorized by statute are necessary for the defense of the nation and are lawful, unless they are in conflict with the Constitution. Conditions when the boat was requisitioned were radically different from those existing before the war. What the boat earned before the war is no measure of what she could have earned during the war.

Just compensation for the use of the *Hawaiian* is not to be measured by the value of her use before the market was "interfered with" by the Government, as plaintiff says. In arriving at the amount which probably would have resulted from fair negotiations between an owner willing to let, and a charterer desiring to hire the *Hawaiian*, lawful governmental regulations, restrictions, and controls cannot be ignored. *American-Hawaiian Steamship Company* v. *United States*, 85 F. Supp. 815, aff'd. 191 F. 2d 26, cert. den. 342 U. S. 941; cf. *Smith-Douglass Co., Inc.*, v. *United States*, 126 C. Cls. 758, 763. Any just and equitable valuation, fairly reflecting a consideration of all relevant facts, must of necessity take into consideration all of the conditions then existing, including lawful legislative and administrative restrictions on the use of the property valued.

But we are, of course, aware that the constitutional requirement that the Government must pay just compensation for what it takes is one which war does not suspend, alter, or modify. *United States* v. *New River Collieries*, 262 U. S.

341, 343; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81. The principles to be applied by the courts do not vary, whether the power to take be exercised in time of war or in time of peace.

Defendant contends that the bareboat requisition rate should not exceed the basic rate allowed by General Order No. 37 of $1.25 per deadweight ton per month, plus appropriate allowances for speed.

Defendant's position is also untenable. In the first place, this rate is not binding on the courts. Especially in a case where the rate fixed is not one applicable between private parties, but only as between the Government, who is the taker, and the owner, whose property is taken, a rate fixed by the Government should not be conclusive. The ascertainment of just compensation is not an administrative but a judicial function; no power exists in any administrative agency of the Government to declare what that compensation should be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States*, *supra*, p. 327; *Gulf Refining Co.* v. *United States*, 58 C. Cls. 559, 576.

While mindful of the complexity of the task confronting the War Shipping Administration, we are of the opinion that any method aimed, as was that of the War Shipping Administration, at the establishment of a rate applicable to all of a large class of dry cargo vessels, is "plainly inaccurate" when applied to any particular vessel. *Gulf Refining Co.* v. *United States*, *supra*, p. 577. There can be no presumption as to the correctness or the fairness of a rate made applicable indiscriminately to all vessels of a certain class. Although it may be impracticable, from the Government's standpoint, to determine just compensation for each particular vessel, the right to a judicial determination, if the owner is dissatisfied with the compensation determined for his vessel, is guaranteed by the Merchant Marine Act and by the Fifth Amendment. This court, while giving weight to the administrative determination, must nonetheless determine from the facts proven what it thinks is just compensation. *Borland* v. *United States*, 57 C. Cls. 411, 415.

We do not mean to imply that the basic rate established by the War Shipping Administration might not, under appropriate circumstances, be coterminous with just compensa-

tion for a particular vessel; but we must conclude on the record before us that the bareboat requisition rate fixed by defendant as the yardstick to measure just compensation for all vessels of the *Hawaiian's* class is not "just" in her case.

Plaintiff's vessels were used in the intercoastal trade prior to the outbreak of war in Europe in 1939. The testimony discloses earnings for the last quarter of 1939, the last quarter of 1940, and the last quarter of 1941. For these three periods they were $1.29, $2.23, and $3.27 per deadweight ton per month, respectively. On voyages in foreign trade, commencing in 1941 and terminating in 1941 or 1942, including voyages under time charter with the Maritime Commission, plaintiff's profits, before overhead, depreciation and taxes, were $4.19 per deadweight ton per month. Exclusive of such voyages under time charter with the Maritime Commission, its profits were $5.13 per deadweight ton per month, before overhead, depreciation, and taxes.

On the other hand, the War Shipping Administration had fixed a rate for time charters of vessels such as the *Hawaiian* at a basic rate after May 1942 of $4.15 per deadweight ton per month, which had been agreed to by the owners, including plaintiff, reluctantly, it is true, and after threat of requisition of title by the War Shipping Administration, but nevertheless agreed to. Applied to the *Hawaiian* this would have amounted to $4.35 on a time charter. As near as we can tell from the testimony, plaintiff's average cost of operation of its vessels under requisition time charters, exclusive of overhead, depreciation, and taxes, was $1.89 per deadweight ton per month.[1] This leaves $2.46. Plaintiff accepted this, although under some compulsion. It cannot be denied, however, that the War Shipping Administration "beat the owners down" as much as they could in establishing a rate of hire.

Prior to requisition on a time charter basis, in April 1942, plaintiff had of course been making high profits. But, even in the absence of restrictions, war conditions would no doubt have reduced these profits; except for the restrictions, they would no doubt have been considerably in excess of the figure of $2.46.

---

[1] Apparently plaintiff's overhead continued even after requisition on a time charter basis.

Plaintiff's vessel was old. Its useful life was short. This, of course, affects the rate to be paid.

None of the things we have mentioned give any satisfactory basis for fixing just compensation, but taking everything into consideration, among others the general characteristics of the vessel, her physical condition, her age, her earnings before requisition on a time charter basis and afterwards, the demand for and supply of shipping space, legislative and administrative restrictions, and the uncertainties of the war, we have concluded that $2.50 a deadweight ton per month is "just" both to the owner and the Government.

We do not need to discuss deductible enhancement. The restrictions imposed more than offset any enhancement due to the causes that necessitated the taking. *Smith-Douglass Co., Inc.*, v. *United States*, 126 C. Cls. 758, 767.

Plaintiff is entitled to recover from the defendant hire at the rate of $2.50 per deadweight ton per month, less the amounts paid by defendant on account. In addition, plaintiff is entitled to recover interest, not as interest but as a part of just compensation, at the rate of 4 percent per annum on the unpaid balance of each monthly installment, beginning August 1, 1943, and continuing to the payment of the judgment herein.

Entry of judgment is suspended pending the incoming of a stipulation by the parties showing thhe amount due, computed in accordance with this opinion. In the absence of such a stipulation within a reasonable time, the case will be remanded to a Commissioner for a report showing the amount due, computed in accordance with this opinion.

It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

LARAMORE, *Judge*, took no part in the consideration or decision of this case.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Currell Vance, and the briefs and argument of counsel, makes findings of fact as follows:

1. At all times relevant to this case, the American steamship *Hawaiian* was wholly owned by the plaintiff, American-Hawaiian Steamship Company, a New Jersey corporation, organized in 1899. On July 7, 1943, at 6:50 p. m., the defendant, acting through the War Shipping Administration, took the possession and use of the *Hawaiian* at Baltimore, Maryland, on "bareboat basis." The taking was by requisition under authority of Section 902 (a) of the Merchant Marine Act, 1936, as amended. Possession and use of the vessel by the War Shipping Administration under such requisition continued until she was redelivered to the plaintiff at Richmond, California, on May 1, 1946, at 12:00 midnight.

2. By letter dated July 31, 1944, the War Shipping Administration tendered plaintiff a demise or "bareboat" form of charter party describing the *Hawaiian* as having 9,460 tons deadweight capacity and setting forth proposed terms of the use of the *Hawaiian* during the bareboat requisition period, including an offer of hire at the rate of $12,108.80 per calendar month. The terms of the charter tendered were those prescribed by War Shipping Administration General Order No. 13, Supplement 1, issued April 7, 1944. The hire offered was specified in War Shipping Administration General Order No. 37, also issued April 7, 1944, "to establish * * * rates of charter hire for self-propelled ocean-going iron and steel vessels * * * requisitioned for use pursuant to the provisions of Section 902 of the Merchant Marine Act, 1936, as amended * * *." Under General Order No. 37, the rate of bareboat hire for dry cargo vessels built during the period 1914–1934 was $1.25 per deadweight ton per month, with certain additional allowances for vessels having speeds equal to or in excess of 11 knots. The hire tendered for the *Hawaiian* was at the rate of $1.28 per deadweight ton per month, being the sum of $1.25 and an additional $0.03 provided for vessels having speeds equal to or exceeding 11 knots but less than 12 knots. As the *Hawaiian's* speed exceeded 12 knots (see finding No. 4), she was entitled under General Order No. 37 to $0.06 instead of $0.03 in addition to the basic $1.25 per deadweight ton per month.

3. On August 24, 1944, plaintiff wrote the War Shipping Administration declining to accept either the form of charter

or the rate of hire offered. As required by Section 902 (d) of the Merchant Marine Act, 1936, as amended, defendant made, between March 24, 1944, and August 16, 1946, monthly payments to plaintiff aggregating $307,079.74, on account of just compensation for the use of the *Hawaiian*. The aggregate amount of such payments on account was equivalent to hire at the monthly rate of $9,081.60 or 96¢ per deadweight ton for the bareboat requisition period of 33 months, 25 days, 5 hours and 10 minutes and was also equivalent to 75% of hire at the rate of $1.28 per deadweight ton per month, tendered by defendant on July 31, 1944.

Thereafter, plaintiff brought this suit to recover, as just compensation for the use of the *Hawaiian*, hire at the rate of $6.00 per deadweight ton per month, less the hire which the defendant has already paid on account at the rate of 96¢, the net compensation claimed being equivalent to $5.04 per deadweight ton per month. In addition, plaintiff also claims compensation for defendant's delays in payment.

Settlement has been made of the claims of plaintiff and defendant, respectively, for consumable stores and fuel aboard the vessel when the requisition period began and ended and also of plaintiff's claims for reconditioning of the vessel on her release from requisition.

4. At all times material to this suit, the *Hawaiian* was a steel, ocean-going, single-screw, steam freighter built in 1919, documented under the laws of the United States, and was classed A1 by the American Bureau of Shipping.

Her deadweight carrying capacity was 9,460 tons and her bale cubic capacity was 413,495 cubic feet. She was designed to carry all types of goods, except liquids in bulk and refrigerated cargo, but was especially well suited for the carriage and handling of general cargo by reason of having three complete decks, an extra (orlop) deck in No. 1 hold, 5 cargo hatches, and 7 sets of cargo gear.

The vessel's propelling machinery consisted of quadruple-expansion, reciprocating engines of 3,400 indicated horsepower and four oil-burning, scotch-type boilers, giving her a speed in excess of 12 knots. By reason of her bunker capacity of 16,306 barrels and daily consumption of 206 barrels, the *Hawaiian* had a cruising radius of 23,420 miles.

The register dimensions of the vessel were: length, 404.6 feet; breadth, 53.9 feet; depth, 26.2 feet. Her draft on summer load line was 28′ 5¼″ and her corresponding gross register tonnage was 6,264 tons.

Her equipment included a heavy lift boom, special lockers for valuable cargo, radio direction finder, electric sounding machine and spare parts in excess of those required by the American Bureau of Shipping.

The crew complement, including master, was 39.

The *Hawaiian* was acquired by plaintiff in 1925 at a cost of $375,000. As of December 31, 1937, her total capital costs to plaintiff had amounted to $414,669.55, and she was carried for tax purposes on the books of the company at a remaining value of $99,859.05. As of December 31, 1943, the *Hawaiian* was listed for tax purposes as having a remaining value of $13,519.99, and a remaining life of one year.

Defendant does not contend that, as applied to the *Hawaiian*, the basic valuation of $56.25 per deadweight ton (plus allowances for speed) as of April 1944 found by the War Shipping Administration in connection with the issuance of General Order No. 37 (see finding 30) was too high.

5. Surveyors and inspectors representing both plaintiff and defendant examined the *Hawaiian*, both in drydock and afloat, at or about the time of her taking in July, 1943, and found her to be in good condition.

6. Neither at the time of her taking nor at any subsequent time during the bareboat requisition period of the *Hawaiian* was there a free market in the United States for the use of large, ocean-going, American-flag freighters because on April 18, 1942, the use of all such privately-owned vessels had been requisitioned on "time charter basis" by the War Shipping Administration. The War Shipping Administration continued to retain possession and use of substantially all such freighters from April 1942, until after March 2, 1946.

The period of Government use of a number of such freighters began even prior to the general requisitioning in April 1942. The United States Maritime Commission and its successor agency, the War Shipping Administration, had acquired the use of many such freighters by chartering them directly at various times after June 2, 1941. Those agencies

had also controlled the employment of various other freighters by directions given in the course of administering the Ship Warrants Act of July 14, 1941 (55 Stat. 591). In such cases, the agencies prescribed the rates of charter hire at levels generally below current market rates. (See Finding No. 21.)

7. Worldwide changes in conditions affecting the profitability of commercial merchant shipping occurred as a result of the outbreak of war in Europe in September 1939.

Prior to the war, there had been an oversupply of shipping throughout the world and particularly in the United States. Afterwards, a worldwide shortage of vessels available for trade developed and, by the end of 1940, shipping space was hard to get. For the first time in years, capacity cargoes were available both outward and homeward.

Under such conditions, economic factors, applicable alike to water and rail carriers, caused earnings of carriers to increase in much higher proportion than the mere rate of increase in traffic, one principal cause being the fact that the costs of carriage do not increase proportionately to increases in the quantity of cargo carried per vessel or train or in the length of the haul. It follows also that an increased rate of earnings does not necessarily imply an increase in the level of tariff rates charged to shippers.

As a result of the foregoing conditions, the commercial earnings of large, American freighters rose sharply during the period 1939–41.

There is no evidence that the ocean tariff rates charged to shippers at the levels fixed by conference carriers at any time during this period exceeded rates justifiable under the conditions, although some charges being assessed in 1941, "mostly other than conference rates," were, in the opinion of the Maritime Commission, excessive.

8. None of the increased carryings of American-flag freighters during the two years following November 4, 1939, included munitions of war or other traffic to or from the combat zones in Europe because the Neutrality Act of November 4, 1939 (54 Stat. 4), excluded our merchant vessels from those zones.

Among the principal underlying causes for the increase

in carryings and earnings of American freighters during this period were the following:

(a) The decrease in the effective world supply of freighters available for commercial employment as a result of such war conditions as sinkings, immobilization by blockade, delays by war damage, delays by convoy operations in combat zones, and diversion by belligerents of their own merchant vessels to military use or to use in combat areas from which our shipping was excluded by the Neutrality Act;

(b) The increase in volume of traffic available to American-flag freighters in foreign trade by the decline in competition from foreign-flag freighters on routes outside the combat zones;

(c) The increased proportion of traffic producing higher freight revenues resulting from increased exports of manufactured goods from the United States after Europe was cut off as a source of supply to other world areas;

(d) The general improvement in business conditions in the United States.

9. The earnings of freighters are derived from two principal kinds of operations: (a) charter operation; and (b) berth operation. In addition, some vessels are operated by industrial carriers serving primarily their parent companies.

(a) In a charter operation, a single charterer contracts with the shipowner for the entire carrying capacity of the vessel in consideration of which the charterer agrees to pay the shipowner either a monthly rate of charter hire, as in the cases of bareboat charters and time charters, or an agreed freight per voyage, as in the case of voyage or "trip" charters. Voyage charter freight may be fixed at a stated rate per ton or other unit of cargo (a rate charter), at a stated rate per unit of the vessel's cargo space (a space charter), or at a lump sum (lump sum charter).

Under the usual bareboat charter, the charterer has full possession and operation of the vessel and pays all expenses, including upkeep.

Under the usual time charter, the shipowner retains possession and operation of the vessel and pays for her supplies, crew, repair and ordinary insurance, but the charterer pays for fuel, cargo and port expenses and also for war risk insurance on the vessel.

Under a voyage charter, the shipowner operates the vessel at his expense. The cargo and port expenses and cost of war risk insurance may be borne either by the shipowner or charterer or partially by each, depending on the terms of the charter. Under a "net form" voyage charter, the charterer or cargo owner pays the expenses incident to the loading and discharge whereas under a "gross form," the ship pays such expenses.

If a charterer is a common carrier or if he subcharters to others, his profit is the difference between (a) the charterer's revenue from freights which he obtains from the actual shippers of cargo or from the subcharterer, and (b) the charterer's expenses which include charter hire or freight and such vessel, voyage, cargo or other expense as the terms of the charter may place on the charterer.

(b) In berth operation, the shipowner is a common carrier transporting goods for the general public at freight rates fixed in conference or other tariffs and paying all the expense of the operation. The entire earning power of the vessel is realized by the shipowner in berth operations, instead of being divided between the owner and the charterer as in charter operations, where the shipowner realizes less than the entire earning power of the ship in the interest of obtaining certainty of income.

10. Plaintiff was engaged, in the normal peacetime operations of the company, in the intercoastal trade. The earnings of plaintiff's fleet of 32 freighters in 1941 and in 1942, up to the time of their requisitioning by defendant on time charter basis, were derived from operations both in the domestic and foreign trades. In the domestic intercoastal trade plaintiff maintained a berth operation. In the foreign trade plaintiff engaged in both charter operations and berth operations with 20 of its vessels.

The earnings per deadweight ton per month (before overhead, depreciation, and taxes) realized by plaintiff from intercoastal voyages terminating in the last quarters of 1939, 1940 and 1941, are as follows:

1939	$1.29
1940	2.23
1941	3.27

Plaintiff's charter operations in foreign trade in 1941 and 1942 (other than those under certain time charters to the United States Maritime Commission) were of two kinds: (a) under 10 commercial time charters made to other private operators; and (b) under 10 space charters to the British Ministry of War Transport for voyages outward from the United States to ports in the Red Sea.

Plaintiff's berth operations in foreign trade consisted of: (a) return voyages to the United States after conclusion of the space charters to the Red Sea; and (b) three round voyages between the United States and ports in South Africa.

11. The average earnings realized by plaintiff from all voyages which commenced in 1941 and terminated in 1941 or 1942 by all plaintiff's vessels operating in foreign trade (except from voyages under charters to the Maritime Commission), were as follows:

Plaintiff's average 1941–42 earnings in foreign trade

[From Plaintiff's Exhibit 25]

	Deadweight, ton months	Profit
1. Time charters (11 voyages)	650, 796. 57	$3, 144, 473. 61
2. Space charters outward and berth voyages homeward (10 voyages)	547, 128. 69	3, 106, 878. 53
3. Berth voyages to South Africa (3 voyages)	132, 762. 67	573, 455. 02
Total	1, 330, 687. 93	6, 824, 807. 16

Average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941–42

(Before overhead, depreciation and taxes)

$$\frac{\$6,824,807.16}{1,330,687.93}=\$5.13$$

(After overhead and before depreciation and taxes)

$$\frac{\$6,824,807.16-\$240,480.00}{1,330,687.93}=\$4.95$$

The average earnings realized by plaintiff from 14 voyages under time charters with the Maritime Commission, with the first voyage beginning on October 17, 1941, and the last terminating on October 12, 1942, were $2.54 per deadweight ton per month, before overhead, depreciation, and taxes.

The average profit per deadweight ton per month from all plaintiff's foreign trade voyages in 1941–42, including those under charters to the Maritime Commission, was, before overhead, depreciation, and taxes:

$$\frac{\$8,761,612.69}{2,093,147.93}=\$4.19$$

12. The earnings realized by plaintiff's vessels were typical of the earnings being realized in foreign trade by large American freighters generally during the period preceding the general requisitioning in 1942 (See Findings Nos. 13, 14, 15, and 16), such earnings reaching peak levels in June 1941, and thereafter declining, as the result of the passage of the Ship Warrants Act. Although the evidence establishes that levels of earnings did decline somewhat from peak levels of June 1941, the amount thereof cannot be determined with reasonable accuracy from the record.

13. Illustrative of the earnings then available in foreign berth operations were the earnings of three American freighters of the Hog Island type, which States Marine Corporation bought in late 1940 or early 1941.

Before the outbreak of war in Europe in September 1939, States Marine Corporation operated entirely with chartered foreign-flag vessels. The number of charters which they made per year averaged about 300. An average of 40 time chartered vessels was used to maintain about twelve berth services from the United States to Europe, South Africa and Japan. In addition, the company engaged in numerous full cargo trades and acted as agents for others.

As a result of the scarcity of foreign-flag vessels in 1940, the company began chartering American-flag vessels and also purchased the three Hog Island vessels in question. Until they were requisitioned on time charter basis in 1942, these three vessels were employed on 23 voyages in the company's berth service between the United States and South Africa. The first voyage began on October 30, 1940, and the last voyage terminated on May 13, 1942. The average profit of the three vessels while so operated amounted to $4.92 per deadweight ton per month (apparently before overhead, depreciation and taxes).

14. The profitability of American freighters in charter or "tramp" operations in foreign trade during 1940–42 is shown

by the earnings of two Hog Island vessels, the *Ann Skakel* and the *Patricia Skakel*, purchased in December 1940 and January 1941, respectively, by subsidiaries of Parry Shipping Company, Inc., of New York. Operating under various forms of charter, the vessels loaded or discharged cargoes in the United States, the Far East, India, South America, Canada, and West Africa.

From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1941, her earnings were $4.22 per deadweight ton per month before depreciation, overhead, and Federal income taxes. From the voyages of the *Ann Skakel* completed within the company's fiscal year ending October 31, 1942 and prior to requisitioning of the vessel by the War Shipping Administration on May 8, 1942, her earnings were $2.94 per deadweight ton per month before overhead, depreciation, and Federal income taxes. The average earnings of the vessel from the time of its purchase in December 1940 until its requisition by the War Shipping Administration on May 8, 1942 were $3.79 per deadweight ton per month before overhead, depreciation, and Federal income taxes.

The first voyage of the *Patricia Skakel* consisted of a space charter from New York to Vladivostok, a voyage charter for a cargo of sugar from Java to Ceylon and a voyage charter with a cargo of ore from India to Baltimore, occupying 176 days from the beginning of loading in New York on January 29, 1941. From that round voyage the vessel's gross revenue was $492,368.33 and her net profit, $298,546.98, equivalent to $6.36 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

From the remaining voyages of the *Patricia Skakel*, commencing in July 1941 and occupying about 384 days, average earnings amounting to $3.27 per deadweight ton per month, before overhead, depreciation and Federal income taxes, were realized by her owner. The average profit realized by her owner from the entire operation up to September 19, 1942, when defendant requisitioned title to the *Patricia Skakel*, amounted to $4.25 per deadweight ton per month, before overhead, depreciation, and Federal income taxes.

15. A compilation prepared by certified public accountants from voyage reports submitted to the Maritime Commission

by various shipping companies with respect to the earnings of American freighters built before 1935 and of 7,000 deadweight tons and over, on voyages terminating in the last quarter of 1941 or early 1942, show the following:

(a) Owned vessels operated by owner:

On 68 foreign overseas voyages, the average operating profit (before depreciation and overhead) amounted to $5.50 per deadweight ton per month. On 49 foreign nearby voyages, the average operating profit (before depreciation and overhead) was $3.55 per deadweight ton per month. On 55 domestic voyages, the average operating profit (before depreciation and overhead) was $2.64 per deadweight ton per month. The average operating profit (before depreciation and overhead) on all domestic and foreign voyages was $4.41 per deadweight ton per month.

(b) Owned vessels time chartered to others:

On 17 foreign overseas voyages, the owner's average profit (before depreciation and overhead) was $4.44 per deadweight ton per month. On 2 foreign nearby voyages, the owner's average profit (before depreciation and overhead) amounted to $4.73 per deadweight ton per month. There were no reports of domestic voyages in this class. The owner's average profit (before depreciation and overhead) on all foreign voyages was $4.45 per deadweight ton per month.

(c) Vessels bareboat chartered from others:

These vessels were all owned by the Maritime Commission. On 46 foreign overseas voyages, the charterers' average direct operating profit before the payment of bareboat hire amounted to $4.88 per deadweight ton per month, and after the payment of bareboat hire averaging $2.21 per deadweight ton per month, the charterers' average net profit was $2.67 per deadweight ton per month. There were no reports of foreign nearby voyages in this class, and only 1 domestic voyage.

The foregoing data reflected the results of voyages terminating in the last quarter of 1941 or early 1942, under charters or arrangements made prior to that time.

The foregoing data indicate that the Maritime Commission was, some time prior to the general requisitioning in April 1942, collecting bareboat hire at a rate in excess of the amount ($1.00 per deadweight ton per month) which the

War Shipping Administration later proposed to include (see finding 24) in its computation of requisition time charter hire as "bareboat" compensation to owners of requisitioned freighters.

16. Until after the Ship Warrants Act became effective on July 14, 1941, time charter rates of $7.50 per deadweight ton per month were the prevailing rate. Such a rate would yield a "bareboat" return or equivalent of $5.61 per deadweight ton per month (after overhead but before depreciation and taxes) after deducting the actual average vessel and voyage expenses (plus overhead) of $1.89 per deadweight ton per month incurred by plaintiff's vessels while engaged on 11 voyages under time charters during the period from February 2, 1941 to April 17, 1942.

17. The evidence does not establish that the level of earnings realized by shipowners from the use of freighters such as the *Hawaiian* for the carriage of commercial cargo some months prior to the general requisitioning of all such privately owned vessels in April 1942 could reasonably have been realized by the plaintiff throughout the bareboat requisition period if the *Hawaiian* had not been requisitioned by defendant, but had remained in plaintiff's possession and control.

Economic conditions of demand for and supply of shipping space, which had materially contributed to or brought about the level of earnings realized by shipowners in 1941 from the commercial employment of large, American-flag freighters such as the *Hawaiian*, throughout the bareboat requisition period remained favorable to a continuance of the potential level of earnings of such freighters from commercial employment at or above 1941 levels.

Other factors and circumstances which materially affected the level of earnings realizable from the commercial employment of large, American-flag freighters such as the *Hawaiian* came into being prior to the general requisitioning in April of 1942, on time charter basis, of all such privately owned vessels. On July 14, 1941, the Ship Warrants Act, 55 Stat. 591, was passed. (See finding 21.) After the passage of this Act, there was a substantial decline in the level of earnings realizable from the use of freighters such as the *Hawaiian*. Perhaps as importantly, from the standpoint

of impact upon the earnings realizable from the commercial employment of all large, American-flag freighters, this country entered World War II on December 8, 1941.

Thereafter, the level of earnings previously realizable from the employment of large, American-flag freighters such as the *Hawaiian* for the carriage of commercial cargo (see findings 7–16) no longer existed. Although the record does not establish with great particularity the full extent of restrictions nor the exact amount of reduction in earnings brought about by war conditions, it sufficiently appears from the record that a vessel would have been unable to operate under unrestricted free-market conditions during the bareboat requistion period, not only because of legislative and administrative regulations, restrictions, and controls, but also by reason of historic circumstances and conditions arising from this country's entry into the war.

Convoy protection, with its incident delays, was required in substantially all, if not all, trades. Priorities on steel for repairs and on scarce fuel oil were essential for continued operation of a vessel. It would have been impossible for a privately owned ship to operate in a service geared to securing for its owner the highest revenues, and at the same time to obtain the necessary priorities and protection from the Government. Under all the facts and circumstances of record or of which the court may take judicial notice, the market value of the use of the *Hawaiian* during the period prior to her requisition by the defendant on time charter basis in 1942 does not establish the fair and reasonable value of her use on bareboat basis throughout the period of defendant's requisition of her use on such basis from July 7, 1943, to May 1, 1946.

18. After the Ship Warrants Act became effective and after the entry of this country into World War II, it became progressively impossible, because of war conditions and because of measures taken by the War Shipping Administration and the Maritime Commission pursuant to the Act, for American shippers to operate without acceptance of the Government's schedule of rates, with the consequence that such rates came to be accepted by a substantial majority of such shippers.

19. The charter rates promulgated from time to time by the United States Maritime Commission and the War Shipping Administration in the course of administering the Ship Warrants Act of July 14, 1941, and the subsequent requisition programs were not market rates nor equivalent to probable fair market rates.

20. The so-called Ship Warrants Act of July 14, 1941, authorized the United States Maritime Commission and its successor, the Administrator, War Shipping Administration, to prescribe certain conditions to be complied with by such shipowners or charterers as might undertake to do so as a condition of obtaining a license called a "ship warrant" entitling their vessels to priority in "the use of facilities for loading, discharging, lighterage or storage of cargoes, the procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels" in ports under jurisdiction of the United States. Among the conditions so authorized to be prescribed was an undertaking "with respect to * * * the fair and reasonable maximum rate of charter hire or equivalent." The policy required to be followed by the Commission in the administration of the Act was "to make fair and reasonable provision for priorities with respect to" the importation and transportation of substantial quantities of materials described in Section 4 of the Act.

The schedules of rates of charter hire and other conditions prescribed by the Maritime Commission or its successor from time to time, as hereinafter set forth, in the course of administering the Ship Warrants Act were incorporated in written "Uniform Conditions." A ship warrant would not be issued to an applicant who did not undertake to observe such "Uniform Conditions."

Although plaintiff did apply to the Commission on September 25, 1941, and on October 3, 1941, for ship warrants for its vessels, plaintiff did not incorporate in its application an undertaking to observe the "Uniform Conditions." The Commission declined to issue warrants and returned the application to the plaintiff.

21. The measures taken by the United States Maritime Commission or its successor, War Shipping Administration, in the course of administering the Ship Warrants Act of July 14, 1941, included the following:

(a) On July 30, 1941, in Press Release 970, the Commission issued "a scale of maximum time charter rates for United States and foreign flag vessels in which the Commission will concur for charters in which their concurrence is indicated on and after August 1, 1941."

Such scale provided for basic time charter hire at the rate of $4.50 per deadweight ton per month for steamships of 10,000 deadweight tons and up, with an additional 10¢ for each ½ knot of speed in excess of 12 knots. The basic rates for steamers of lesser deadweight tonnage were somewhat higher, the rate for a steamer of the *Hawaiian's* tonnage being $4.60 per deadweight ton per month. Such rates were admittedly about 35% below the then existing time charter rate of $7.50. Berth and other rates were to be adjusted on or before September 1, 1941, to conform to time charter rates.

(b) The schedule of time charter rates contained in Press Release 970 formally became part of the ship warrants procedure by its incorporation into the "Uniform Conditions" issued in connection with the "Ship Warrants Rules and Regulations," dated August 14, 1941, and approved by the President, August 26, 1941, to become effective thirty days thereafter.

(c) On January 5, 1942, the Commission issued its Press Release 1117 making public the Commission's General Order No. 49, dated December 30, 1941, and to be effective January 20, 1942, reducing the maximum time charter rates which warrant-holding vessels were required to observe to levels about 28% below those in Press Release 970.

The new basic maximum time charter rate on steamers of 10,000 deadweight tons and up was $3.25 per deadweight ton per month, compared with the rate of $4.50 prescribed by Press Release 970. An additional 10¢ per deadweight ton per month was allowed for each knot of speed in excess of 10 knots up to 14 knots. For steamers of the *Hawaiian's* tonnage, the new basic maximum rate was $3.35 per deadweight ton per month, as compared with the previous maximum of $4.60. After speed adjustments, the new rate for a steamer like the *Hawaiian* would have been $3.55, as compared with the previous maximum rate of $4.60 under Press Release 970.

(d) Berth rates and certain other rates charged by the operators of warrant-holding vessels were also required by General Order No. 49 and Press Release 1117 to be so adjusted as not to be "in excess of the charges for such service or arrangements in effect September 1, 1940 * * * plus such reasonable additional surcharge as may be approved by the Commission" to cover increases in operating expense subsequent to September 1, 1940, and such requirement was incorporated into the ship warrant procedure by means of revised "Uniform Conditions" issued January 13, 1942.

Surcharges on berth rates were, in fact, authorized by "rate orders" of the War Shipping Administration issued throughout the period 1942–46 until the Warrant Act Regulations were revoked in 1946.

(e) In cooperation with the War Shipping Administration, the American Institute of Marine Underwriters and British Underwriters adopted a special provision called a "Ship Warrant Warranty," to be inserted in ship hull insurance policies issued on and after February 20, 1942, making the holding of a ship warrant a condition of the validity of the insurance.

(f) After February 2, 1943, "nonwarrant holding vessels" were forbidden to use a "facility" without special authorization obtained by application to the War Shipping Administration. Such special authorizations were issued infrequently. The effect was to prohibit such vessels from obtaining repairs, fuel, stevedoring and towage in United States ports, even though the furnishing of such services would not interfere with service to a warrant holding vessel.

Before the "Ship Warrant Warranty" device was brought into operation and, later, all use of shore facilities was denied to vessels not holding warrants, the Warrants Act had been ineffective to compel operators to obtain warrants merely because of the priority accorded to warrant-holding vessels in the use of shore facilities.

22. Prior to the general requisitioning in April 1942, many shipowners protested against the schedules of rates prescribed for warrant-holding vessels. There were few, if any, unqualified acceptances of the P. R. 1117 scale of rates. As a result, readjustments were allowed by the War Shipping Administration by means of "escalator clauses" and

by giving the subsequent time charter requisition rates retroactive effect to January 20, 1942.

23. Following the general requisition on time charter basis in April 1942, the War Shipping Administration on May 14, 1942, issued its General Order No. 8, establishing a scale of requisition time charter rates at amounts intermediate between those in the Maritime Commission's Press Release 970 of July 30, 1941, and those in the Commission's Press Release 1117 effective January 20, 1942. The new scale was made retroactive to January 20, 1942.

Under the General Order 8 scale, steamers of 10,000 deadweight tons and up received time charter hire at $3.75 per deadweight ton per month on sailings prior to May 16, 1942, and at $4 on sailings on and after May 16, 1942. Under Press Release 970 the basic rate for such vessels was $4.50 (see Finding 21a), whereas, under Press Release 1117, the rate was $3.25 (see Finding 21c).

Steamers of the *Hawaiian's* tonnage were allowed, under General Order 8, a basic rate of $3.90 on sailings prior to May 16th and $4.15 on later sailings.

24. Before issuing General Order No. 8 on May 14, 1942, the War Shipping Administration made an investigation of the average cost of operating various classes of vessels, including vessels built before 1937. In connection with its investigation the War Shipping Administration had requested and received from owners reports showing the financial results of some 597 voyages terminating for the most part in the last quarter of 1941, and in a few instances, in early 1942.

The War Shipping Administration approached the question of a requisition time charter rate scale from the standpoint of the sum of two components: (a) a so-called "bareboat" factor of $1.00 per deadweight ton per month (with certain premiums for speed, refrigeration, and an "off-hire" allowance of 10%); and (b) a factor to represent the average of shipowners' expenses under the proposed form of requisition time charter, together with an allowance for owner's overhead.

(a) The "bareboat" factor of $1.00 per deadweight ton per month was not based upon any approximation of the earnings realized by shipowners from commercial employ-

ment of their vessels as shown by the voyage reports above mentioned, indicating such earnings from voyages terminating in the last quarter of 1941 or early 1942. The requisition time charter rates as contained in General Order No. 8 had no relation to the 1941 commercial earnings or the 1941 value of the use of requisitioned vessels. The former Director of Fiscal Affairs of the War Shipping Administration testified at a hearing in this case that "we got together a lot of information and we thought that the best way to fix the rate was to fix it on as low a basis as we possibly could. * * * We know that in 1941 the ships were earning quite a lot of money, and that the rates that were published in General Order No. 8 were nowhere near as high as the earnings the companies were making in 1941."

(b) The expense factor was compiled from statistics on the average vessel expense, from voyages terminating in the last quarter of 1941 or early 1942, for crew's wages, subsistence of crew, stores, supplies, equipment, repairs, other vessel maintenance expense and insurance, with an allowance for owner's overhead of $100 per day, which was later changed to $125 per day. The resulting figures were adjusted to take into account certain known or anticipated increases in costs and for periods of "off-hire."

The principal study of actual vessel expense related to 60 voyages terminating in the last quarter of 1941 by freighters over 20 years old and having from 8,000 to 8,999 tons deadweight capacity, as this was the largest number of voyages in any one class.

To determine the rates applicable to vessels in tonnage classes below and above the 8,000 to 8,999-ton class, additions or subtractions were made to adjust for assumed differences in average vessel operating costs on a deadweight ton basis.

The vessel expenses and overhead shown by the studies fluctuated so widely and would, therefore, cause such wide variations in compensation to owners under a time form operation that the Director of Fiscal Affairs recommended that the War Shipping Administration substitute a bareboat basis of operation. This recommendation was not followed at that time, however, but was in 1943.

25. Prior to the issuance of General Order No. 8 on May 14, 1942, the question of requisition time charter rates was

discussed at a meeting held May 9–11, 1942, between representatives of the War Shipping Administration and a Group of officials (for convenience, hereinafter called the "owner group") representing a number of shipping companies. Among those in attendance were representatives of seven companies holding operating differential subsidy contracts with the Maritime Commission, and of two companies which were subsidiaries of steel companies. Plaintiff was represented at this meeting.

At the meeting, representatives of the War Shipping Administration started discussions with the owner group on the basis of a "bareboat" component of $1.00 per deadweight ton per month. The owner group was given to understand by the Director of Fiscal Affairs that if there was not general acceptance of "a rate that I thought was low enough," he would recommend requisition of title to their vessels.

The owner group declined to discuss rates composed of stated component parts, and the rate finally arrived at was understood to be an "overall rate." However, owner's costs under time charter form of operation of freighters in the 8,000 to 8,999-ton class were discussed between a subcommittee of the owner group and the Comptroller of the War Shipping Administration and various adjustments were made (see finding 24) to arrive at a total proposed rate of $4.10 per deadweight ton per month for freighters in the 8,000 to 8,999-ton class on sailings after May 16, 1942.

Finally, after some of the owner group had indicated that they would recommend acceptance if 25 cents per deadweight ton per month were added to bring the rate as a whole to $4.35, the rate was increased to $4.35. The evidence does not furnish any clear explanation as to the calculation of the rates of hire applying to vessels having tonnages greater or less than those in the 8,000 to 8,999-ton group, but the rate applicable to vessels of the *Hawaiian's* tonnage on sailings after May 16, 1942, was $4.15. On account of the *Hawaiian's* speed (in excess of 12 knots), she was entitled to $4.35.

It does not appear from the evidence that plaintiff's representatives were included in that portion of the owner group which had agreed to recommend acceptance if the 25 cents were added to the $4.10 rate. One of plaintiff's officials in

attendance stated to the meeting that he was reasonably sure plaintiff would not accept. The time charter rates promulgated in General Order No. 8 were ultimately accepted by plaintiff.

26. The evidence in the record establishes that 79 owners of 390 vessels accepted defendant's time charter rates, including plaintiff.

As stated in the preceding finding, the owner group was advised at the May 1942 meeting that if there were not general acceptance of "a rate that I thought was low enough," the Director of Fiscal Affairs would recommend requisition of title to their vessels. One of the owner group present at the meeting declined to accept the time charter rates, and his vessels were later requisitioned for title. Under these circumstances, practical considerations with regard to the shipowner's organization and post-requisition prospects weighed in favor of acceptance of the time charter rates.

Some shipowners had incurred expenses from operating vessels on requisition status or on unexecuted time charter status from dates as far back as January 1942. Acceptance of the time charter rates promulgated in General Order No. 8, or, in the alternative, acceptance of 75 per cent of "just compensation" as determined by the War Shipping Administration with the right to have the amount of just compensation judicially determined, was necessary in order to obtain reimbursement for these expenses. In plaintiff's case, such unreimbursed outlays amounted to about $2,000,000 at the time when the requisition time charter rates were tendered for acceptance.

Time charters were not accepted by all affected owners, and the evidence establishes that many of the charters which were accepted were accepted at a much later date, in connection with settlements by transfer of title or otherwise.

27. In November 1942, a dispute occurred between the Comptroller General of the United States and the Administrator, War Shipping Administration, regarding the application of the so-called "enhancement clause" of Section 902 (a) of the Merchant Marine Act, 1936, to the determination of just compensation for requisitioned vessels. The Comptroller General ruled that the "enhancement clause" prohibited the payment of compensation for vessels to the extent

that it might be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the national emergency. As a result of a notice issued December 17, 1942, the Administrator commenced to withhold 25% of the hire payable under the terms of the requisition time charters. Thereafter, the *Hawaiian* was requisitioned on bareboat basis (See Finding No. 1), and similar requisitions of plaintiff's other vessels followed.

On October 15, 1943, the President appointed an Advisory Board on Just Compensation, which on December 7, 1943, rendered a report of its views on the principles which should be followed by the Administrator in determining just compensation.

Meanwhile, by notices dated October 15, 1943, November 1, 1943, and November 24, 1943, the Administrator instituted a "Revised Program of Ship Requisition, Charter and Operation," which, in effect, provided for termination of the requisition time charters then remaining in force and for a general requisition on bareboat basis. Exception was made for cases where owners might elect to remain on time charter basis but with a revised form of charter and at revised rates.

Thereafter, the compensation offered by the War Shipping Administration for the use of vessels requisitioned on bareboat basis was fixed by General Order No. 37, issued on April 7, 1944.

28. General Order No. 37 was prepared by the Division of Large Vessel Procurement of the War Shipping Administration under the supervision of the Assistant Deputy Administrator for Fiscal Affairs. The basic rate of bareboat charter hire provided by General Order No. 37 for all dry cargo vessels built during the period 1914–34 was $1.25 per deadweight ton per month.

In a memorandum submitted on April 15, 1944, to the House Committee on the Merchant Marine and Fisheries, the Administrator, War Shipping Administration, stated that "the proposed basic rates of General Order No. 37 are:

> (1) below actual earnings of 1940 and not greatly in excess of earnings of 1939;
> (2) only about 40 percent of the rate recently fixed by the court in the *Olson case;*

(3) only about 40 percent of the bareboat rates paid by the Army and Navy in 1941;
(4) less than one-third of the rate fixed administratively in the first [world] war;
(5) about one-third of the actual earnings of 1941;
(6) about one-fifth of the rates allowed by the courts in the first [world] war; and
(7) less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941."

The principal preliminary findings in connection with determination of the rate of bareboat charter hire for freighters built prior to 1935 were that the market value of their bareboat use could not be determined by sufficient hirings made at or about the time of taking, and that the value of the use should be determined in accordance with Rule 3 of the Advisory Board on Just Compensation, which provided as follows:

> Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

The method used by the War Shipping Administration was to give predominant consideration to two "factors", each of which, it was found, showed that an amount of about $1.25 per deadweight ton per month would constitute just compensation for bareboat use. The two "factors" were:

(a) The average amount of "adjusted earnings under current charters," (i. e., under the requisition time charters) and, alternatively;

(b) A sum sufficient to provide for (1) annual "depreciation" on the valuation of the vessels, and (2) a "reasonable rate of return" on such valuation.

Further facts regarding these two alternative factors and the subsidiary findings of the War Shipping Administration

in connection with those factors are stated in findings 29, 30, and 31.

29. In connection with the first factor, it was found that the "adjusted earnings" of the average dry cargo vessel built prior to 1935 had amounted to $1.275 per deadweight ton per month under the requisition time charters.

The procedure of using as a factor in determining just compensation for use under the bareboat requisitions the average "adjusted earnings" under the scale of rates fixed by the War Shipping Administration in connection with its prior requisition on time charter basis was explained on the ground that the requisition time charters were the only "hirings" immediately before the general requisitioning on bareboat basis.

Some consideration but no effect was given to the earnings which requisitioned vessels had realized for their owners prior to defendant's taking of the vessels in April 1942, the reasons given being, in substance, that such earnings were considered to be no longer available to private shipowners, and that time charter rates had been decreasing for some time prior to the general requisitioning on time charter basis in April 1942.

Earnings then being realized by defendant on particular voyages from the employment of requisitioned vessels for the carriage of commercial cargo were not taken into account by the War Shipping Administration in determining just compensation for the use on bareboat basis of requisitioned vessels. Vessels requisitioned by the War Shipping Administration were used for the carriage of military, lend-lease, and commercial cargoes. The evidence does not establish that it was possible for the War Shipping Administration to segregate the results of voyages in which requisitioned vessels were used for the transportation of commercial cargo, as distinguished from voyages in which military or lend-lease cargoes, or combinations of types of cargoes, were carried. The primary consideration in the employment of requisitioned vessels by the War Shipping Administration was the effective utilization of such vessels as a pool of shipping in the interests of furthering the war effort. Vessels were necessarily used uneconomically in many instances, while in other instances vessels were placed

in trades where there was an opportunity for profit. The evidence does not establish that earnings realized on particular voyages by defendant from the employment of requisitioned vessels for the carriage of commercial cargo bear any reasonable relationship to just compensation for the use on bareboat basis of requisitioned vessels.

The statement of "adjusted earnings" of the average dry cargo vessel built prior to 1935 consisted in part of deductions of estimated amounts for "deferred repairs", "allowance for risks", and "overhead", which defendant's witness on the subject was unable to substantiate and which are not shown to have any material application to the *Hawaiian*.

A comparison of the actual audited figures of the plaintiff and of States Marine Corporation for all their operations under the requisition time charters, and the War Shipping Administration figures shows the following result:

Comparison of W. S. A. estimate of "adjusted earnings" under requisition time charters with actual earnings of plaintiff and of States Marine Corporation

Items	W. S. A. estimate (Def. Ex. 191B)		Plaintiff (Pl. Ex. 68)	States Marine (Pl. Ex 75)
1. Actual charter hire		$4.098		
2. Allowance for accrued off hire		.066		
3. Adjusted charter hire		4.032	$3.96	$4.30
4. Reported operating costs	$1.882			
5. Allowance for deferred repairs	.215			
6. Allowance for risks	.250			
7. Adjusted operating costs		2.347	1.89	*1.93
8. Adjusted earnings before overhead		1.685	2.07	2.37
9. Allowance for overhead		.41	**.17	†0
10. Adjusted earnings		1.275	1.90	‡2.37

*Includes $45,343.71 of disputed items of expense equivalent to $0.09 per deadweight ton per month.

**At $60 per day, being the husbanding fee allowed by the W. S. A. to General Agents.

†Husbanding expense is included in operating costs. (*McGrath*, p. 1898.)

‡The actual figure in Plaintiff's Exhibit 73 is $2.40. The figure of $2.37 appearing in the above table is derived from use of months of 30 days each for convenience in calculating the number of "deadweight ton months."

30. In connection with the second alternative "factor" claimed to support the rate of $1.25, three subsidiary "findings" were made by the War Shipping Administration staff:

(a) That the average valuation of requisitioned dry-cargo freighters built prior to 1935 amounted to $75 per deadweight ton as of April 1942 when the general requisitioning on time charter basis had occurred;

(b) That the average anticipated remaining life of such vessels after April 1942 was eight years and their consequent annual rate of "depreciation" was 12½%.

(c) That annual hire at the rate of $15 per deadweight ton (equivalent to $1.25 per deadweight ton per month), would provide both: (i) "a reasonable rate of return" of $5.625, representing 10% of $56.25, the average depreciated valuation of the vessels per deadweight ton as of April 1944; and also, (ii) $9.375, representing the amount of annual depreciation on the average value of $75 (as of April 1942), at the annual rate of 12½%.

(a) With regard to the subsidiary findings that requisitioned freighters built prior to 1935 all had a value of $75 per deadweight ton in April 1942 and that the depreciated value of such freighters in April 1944 was $56.25 per deadweight ton, "the most reliable measure of evaluation" was, in the opinion of the War Shipping Administration, "the value as of the date of general requisitioning in April 1942, depreciated to the date of said determination."

No factual justification appeared for lumping all such vessels together and assigning them the same valuation. On the contrary, the Administration's Division of Statistics and Research found, in respect of the sales and appraisal data studied covering dry cargo vessels of 7,000 to 12,000 tons deadweight, that:

> Any trends or central tendencies noted in this study are qualified by the fact that the number of dry cargo vessels and tankers under consideration is small, probably too small for statistical analysis. Furthermore, vessels of the size included here are quite individualistic in character and would show a high degree of dispersion from any median or average. The best that the data have to offer are some suggestions and tentative conclusions.

Eight "elements" were stated to have been considered in arriving at the April 1942 valuation finding. Of these, two "elements" relating to depreciated construction cost were given little weight. The significance of an "element" consisting of two private sales occurring in January and Feb-

ruary 1941, and another "element" consisting of a "peak sale," also in 1941, was unexplained. Little, if any, weight was given to the "element" of average sales in 1941 from the Government's laid-up fleet. The "element" of appraisal data showing values of $76 in 1942 and $70 in 1943 consisted of some 18 appraisals in March, April, and May 1942, of which 15 were by the Maritime Commission, and three private appraisals in 1943.

The final "element" consisted of "values under current charters," which were found to be from $70 to $75 per deadweight ton. This figure was the valuation which the assumed average vessel would have under the scale fixed by the War Shipping Administration in General Order No. 9 for purposes of war risk insurance under the requisition time charters. After a consideration and weighing of all of the above "elements", the figure adopted by the War Shipping Administration was a valuation of $75 per deadweight ton.

(b) The second subsidiary finding above mentioned was that because of assumed obsolescence, such vessels had a useful remaining life of eight years and a consequent annual "depreciation" of 12½ per cent commencing in April 1942. "Depreciation" was not used in the usual accounting sense but as a measure of a wasting asset approaching the end of its useful life, because of the judgment of the War Shipping Administration that subsequent to the war and immediate post-war periods old vessels would be unable to compete commercially with newer vessels, and that the value of old vessels, except for scrap purposes, would probably be exhausted during the anticipated war and immediate post-war periods.

(c) The third subsidiary finding, that a 10 per cent rate of return on the War Shipping Administration's valuation of the vessels as of April 1944 was a "reasonable rate of return," was based upon the exercise of the judgment of the War Shipping Administration's staff. It was founded, in part, upon the "personal judgment as a business man" of the Assistant Deputy Administrator for Fiscal Affairs, and in part upon the judgment of the War Shipping Administration's staff "of what public opinion would consider a reasonable rate of return."

31. It is not possible to conclude from the evidence that the rate of $1.25 per deadweight ton per month was the rate which would probably result from fair negotiations between an owner willing to let and a charterer willing to hire the *Hawaiian* on or about July 7, 1943, or at any other time during her requisition period.

32. The fair and reasonable value of the use of the *Hawaiian* during the period of bareboat requisition is not capable of measurement with mathematical exactness. From a consideration and evaluation of all of the relevant facts and circumstances of record or of which the court may take judicial notice, including, but not limited to, the general characteristics of the *Hawaiian*, her physical condition, her age, the level of earnings realized by owners from the use of vessels both prior to requisition and under requisition time charter, the demand for and supply of shipping space, the legislative and administrative restrictions to which vessels were subject, and considering the uncertainties caused by this country's participation in World War II, it is found that a bareboat rate of $2.50 per deadweight ton per month during the bareboat requisition period constitutes just compensation for the use of the *Hawaiian*, which does not include any enhancement caused (1) by the Government's need of vessels which necessitated the taking, (2) by the previous taking of vessels of similar types, or (3) by a prospective taking reasonably probable.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover.

The entry of judgment is suspended until the incoming of a stipulation by the parties, or, in the absence thereof, until the incoming of a report of a Commissioner showing the amount due plaintiff, computed in accordance with this opinion.

C. Order Entering Judgment

March 16, 1955

[Caption omitted.]

ORDER.

On October 5, 1954, the court held that plaintiff was entitled to recover but suspended the entry of judgment pending either the filing of a stipulation by the parties or a report by the Commissioner of the court showing the amount due plaintiff computed in accordance with the court's decision.

On February 28, 1955, and March 14, 1955, reports were filed by the Commissioner showing that the sum due plaintiff in accordance with the court's decision is $492,607, together with interest at the rate of 4% per annum, not as interest but as part of just compensation.

Said interest is to be computed on the unpaid balances of each monthly installment from the dates when currently due until the date of payment of judgment, or, if previously paid, until paid. As of this date, there is found to be due plaintiff the sum of $204,220.71 so computed with further interest to be computed at the rate of $53.9843 per day until date of payment of judgment.

Now, therefore, it is ordered this sixteenth day of March, 1955, that judgment be and hereby is entered for plaintiff in the sum of four hundred ninety-two thousand six hundred seven dollars ($492,607) together with interest at the

rate of four percent (4%) per annum on arrearages, not as interest but as part of just compensation, in the sum of two hundred four thousand two hundred twenty dollars and seventy-one cents ($204,220.71) as of this date with further interest until date of payment to be computed at the rate of $53.9843 per day.

By the Court:

MARVIN JONES,
Chief Judge.

D. ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

May 3, 1955

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the rules of this court and, on consideration thereof,

It is ordered this third day of May, 1955, that said motions be and the same are overruled as follows:

* * * * *

48758, American-Hawaiian Steamship Company, as Owner of the American Steamship *Hawaiian*, Defendant's motion.

* * * * *

By the Court:

[S] Marvin Jones,
MARVIN JONES,
Chief Judge.

E. Note and Excerpts From Exhibits

1. Defendant's Exhibit 8B consists of about 4,500 documents dealing with the requisition of large overage dry cargo vessels by the War Shipping Administration.[1] Defendant's Exhibit 8 constitutes a tabulation and break down of those papers under the following headings: names of the steamship lines and of the vessels owned by them which were requisitioned; type of each vessel; its deadweight tonnage; the year built; the year acquired by the owner; the date delivered on a requisition time charter; whether or not the time charter rate was accepted;[2] the basic time charter rate; speed premium; reefer premium; motorship premium; disposition after redelivery from time charter; whether or not the vessel was operated under a bareboat charter; whether or not the bareboat charter rate was accepted; speed premium; reefer premium; motorship premium; whether or not the basic bareboat charter rate was accepted; and the date when the vessel was transferred from time charter to bareboat charter, or purchased by the War Shipping Administration, or redelivered to the owner. Defendant's Exhibit 8A constitutes a supplement to and correction of Exhibit 8. The recapitulation contained in Exhibit 8A gives the following information:

---

[1] By stipulation of the parties, the filing in this Court of Exhibit 8B has been postponed until after the decision on the petition for certiorari in No. 273 and on the cross-petition in the instant case.

[2] It appears from this column that all companies accepted the time charter rate for all of their vessels.

Recapitulation Defendant's Exhibit 8A

a) Deadweight tonnage of vessels on which Bareboat Rates Accepted—920,887 tons.

b) Total deadweight tonnage of all vessels on lists—3,094,734 tons.

c) Total vessels lost under time charter—122 vessels—1,029,132 deadweight tons.

d) Number of Companies which did not accept bareboat rate—5.

e) Deadweight tonnage of vessels on which companies refused bareboat rate—22 vessels—210,441 deadweight tons.

f) Number of vessels transferred from time to bareboat charter—149 vessels.

g) Deadweight tonnage of vessels transferred from Time to Bareboat Charter—1,131,328 tons.

h) Number of Companies accepted Bareboat rate—37.

i) Number of vessels covered by report—390.

2. Defendant's Exhibit 26 consists of the petition prepared and filed by respondent in its renegotiation suit in the Tax Court of the United States, *American-Hawaiian S. S. Co.* v. *Secretary of Commerce, as successor to the United States Maritime Commission,* No. 899–R. Pages 36–38 of that petition contain profit data relating to certain of respondents vessels. These three pages are here reproduced in full (*infra,* pp. 40a–1 to 40a–4).

Exhibit C. American-Hawaiian Steamship Company

DATA CONCERNING RED SEA VOYAGES

	Alabaman	*Alaskan*	*American*	*Arkansan*	*Columbian*	*Hawaiian*	*Kansan*	*Montanan*	*Oklahoman*	*Pennsylvanian*	Grand total
Date voyage began	5/28/41	7/10/41	6/28/41	7/5/41	6/6/41	7/24/41	7/30/41	5/20/41	9/19/41	9/4/41	
Final discharge in Red Sea	8/17/41	10/1/41	9/14/41	9/22/41	8/3/41	10/2/41	10/11/41	7/31/41	12/21/41	11/16/41	
Deadweight ton months	46, 952	46, 589	41, 229	47, 429	32, 937	37, 364	43, 237	37, 798	51, 915	39, 577	425, 027
Date space charter hire paid	7/12/41	8/19/41	8/1/41	8/19/41	7/11/41	8/27/41	9/15/41	6/23/41	1/9/42	10/9/41	
Space charter hire received	$410, 664. 60	$383, 408. 85	$349, 124. 25	$440, 997. 36	$326, 948. 75	$337, 888. 77	$354, 369. 20	$345, 582. 42	$240, 892. 80	$375, 797. 75	[1] $3, 565, 674. 79
Less: Reduction in charter hire claimed by respondent on account of War Risk Insurance premiums	20, 149. 41	20, 395. 60	18, 441. 19	22, 891. 77	16, 625. 00	16, 625. 00	20, 397. 07	19, 000. 01	18, 682. 82	21, 547. 05	194, 454. 93
Net charter hire if respondent's claim is sustained against petitioner	390, 515. 19	363, 013. 25	330, 683. 06	418, 405. 59	310, 323. 75	321, 263. 77	333, 972. 13	326, 582. 41	222, 209. 97	354, 250. 70	3, 371, 219. 86
Costs applicable to charters	279, 099. 60	298, 153. 73	247, 087. 09	289, 456. 12	214, 528. 84	228, 441. 20	263, 011. 43	238, 943. 40	279, 397. 20	263, 425. 80	2, 601, 544. 40
Profit from charters before Federal taxes	111, 415. 59	64, 859. 52	83, 595. 97	128, 949. 47	95, 794. 96	92, 822. 57	70, 960. 71	87, 639. 01	[57, 187. 23]	90, 824. 90	769, 675. 46
Federal taxes	80, 664. 89	46, 958. 29	60, 523. 48	93, 359. 42	69, 355. 54	67, 203. 54	57, 478. 18	63, 450. 64	[46, 321. 66]	73, 568. 17	566, 240. 49
Profit after Federal taxes	30, 750. 70	17, 901. 23	23, 072. 49	35, 590. 05	26, 439. 41	25, 619. 03	13, 482. 53	24, 188. 37	[10, 865. 57]	17, 256. 73	203, 434. 97
Profit per deadweight ton per month	.65	.38	.56	.75	.80	.69	.31	.64	[.21]	.44	.48

[1] Excluding demurrage of $137,705.58 remaining unpaid.
[ ] denotes loss.

THIS PAGE BOUND VERTICAL IN BOOK

Exhibit D. American-Hawaiian Steamship Company

DATA CONCERNING VOYAGE TIME CHARTERS

	Alabaman	*Alaskan*	*American*	*Arkansan*	*Columbian*	*Hawaiian*	*Illinoian*
Date voyage began	11/24/41	1/5/42	12/18/41	12/22/41	10/17/41	1/8/42	12/11/41
Date voyage ended	6/4/42	6/12/42	6/11/42	6/16/42	4/6/42	5/24/42	6/12/42
Deadweight ton months	66,343	54,510	55,273	60,784	53,940	43,028	65,758
Date of final payment of charter:							
Hire by U. S. Maritime Commission	11/12/42	7/24/42	8/11/42	8/26/42	4/13/42	7/18/42	11/19/42
Charter hire received	$296,900.44	$241,582.77	$246,692.70	$271,793.75	$247,350.42	$197,178.61	$282,642.34
Less: Refunded off hire					1,203.70		6,625.10
Net charter hire	296,900.44	241,582.77	246,692.70	271,793.75	246,146.72	197,178.61	276,017.24
Costs applicable to charters	164,267.52	156,357.84	155,005.15	149,874.81	148,296.87	129,367.24	177,601.75
Profit from charters before Federal taxes	132,632.92	85,224.93	91,687.55	121,918.94	97,849.85	67,811.37	98,415.49
Federal taxes	105,264.44	69,032.19	73,933.45	98,311.37	75,638.31	54,927.21	79,366.20
Profit from charters after Federal taxes	27,368.48	16,192.74	17,754.10	23,607.57	22,211.54	12,884.16	19,049.29
Profit per deadweight ton per month	.41	.30	.32	.39	.41	.30	.29

THIS PAGE BOUND

	Iowan	*Montanan*	*Ohioan*	*Oregonian*	*Puerto Rican*	*Utahan*	*Washingtonian*	Total
Date voyage began	12/6/41	11/2/41	11/30/41	11/7/41	12/23/41	12/23/41	12/24/41	
Date voyage ended	2/5/42	4/9/42	5/8/42	3/30/42	7/3/42	10/12/42	4/6/42	
Deadweight ton months	20,526	49,991	50,139	45,613	55,173	99,009	36,828	756,915
Date of final payment of charter:								
Hire by U. S. Maritime Commission	3/14/42	4/13/42	11/ 6/46	4/24/42	11/4/42	(1)	5/11/42 [2]	
Charter hire received	$92,418.83	$232,414.19	$223,187.75	$205,517.27	$271,238.02	$450,920.38	$165,447.50	$3,425,284.97
Less: Refunded off hire			2,282.36		13,781.53	15,397.92	3,923.40	43,214.01
Net charter hire	92,418.83	232,414.19	220,905.39	205,517.27	257,456.49	435,522.46	161,524.10	3,382,070.96
Costs applicable to charters	48,077.66	130,464.40	124,021.93	126,754.91	147,552.86	284,022.76	94,723.13	2,036,388.83
Profit from charters before Federal taxes	44,341.17	101,949.79	96,883.46	78,762.36	109,903.63	151,499.70	66,800.97	1,345,682.13
Federal taxes	34,364.81	79,529.19	77,200.38	60,781.72	88,913.07	122,694.52	54,079.64	1,074,036.50
Profit from charters after Federal taxes	9,976.36	22,420.60	19,683.08	17,980.64	20,990.56	28,805.18	12,721.33	271,645.63
Profit per deadweight ton per month	.49	.45	.39	.39	.38	.29	.35	.36

[1] SS. *Utahan* revenue and costs include defensing period Sept. 20, 1942, to Oct. 12, 1942. Hire for this period has not been paid.
[2] Balance of charter-hire remaining unpaid on Apr. 28, 1942, was $9,089.43.

Page 38 of Defendant's Exhibit 26

Exhibit E. American-Hawaiian Steamship Company

DATA CONCERNING REQUISITION TIME CHARTERS FOR THE YEAR 1942

Number of deadweight ton months	2, 415, 281
Gross charter hire	$9, 887, 184. 16
Less: Refunded off hire	313, 507. 66
Net charter hire	9, 573, 676. 50
Costs applicable to charters	5, 801, 176. 74
Profit from charters before Federal taxes	3, 772, 499. 76
Federal taxes	3, 055, 724. 81
Profit from charters after Federal taxes	716, 774. 95
Profit per deadweight ton per month	. 30

F. Opinion of the Court of Claims in the American-Hawaiian Steamship Co. Title Requisitioning Cases

In the United States Court of Claims

Nos. 48720, 48935, 48936, 48940, 49126, 49136, 49141, 49990, 42–52, 43–52.
(Decided July 12, 1955)

AMERICAN-HAWAIIAN STEAMSHIP CO. v. THE UNITED STATES

Mr. Clement C. Rinehart for plaintiff. *Messrs. Carl H. Watson, Jr.*, and *Kirlin Campbell & Keating* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

OPINION

Whitaker, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover just compensation for the requisitioning for title by the defendant of its vessels *Nebraskan*, *Dakotan*, *Iowan*, *Nevadan*, *Pennsylvanian*, *Kentuckian*, *Illinoian*, *Columbian*, *Mexican* and *Virginian*. The ten suits were consolidated for trial. The *Pennsylvanian*, *Illinoian*, and the *Kentuckian* petitions include a cause of action for just compensation for the use of the vessels before their requisition for title. The causes of action for use of these three vessels are being tried separately and are not involved in this decision.

Between December 2, 1942, and May 23, 1946, the War Shipping Administration, acting pursuant to section 902 (a) of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U. S. C. sec. 1242, requisitioned for title the above named vessels on the dates set forth below:

Vessel	Date	Hour	Vessel	Date	Hour
	1943			*1944*	
Nebraskan	Dec. 2	Noon.	*Illinoian*	June 30	10:00 a. m.
Dakotan	Dec. 12	Noon.	*Kentuckian*	June 30	1:00 p. m.
Iowan	Dec. 26	Noon.		*1945*	
	1949		*Columbian*	Jan. 8	4:00 p. m.
Neradan	Jan. 17	8:00 a. m.		*1946*	
	1944		*Mexican*	May 14	Midnight
Pennsylvanian	June 30	10:00 a. m.	*Virginian*	May 23	Midnight

The plaintiff was tendered as just compensation, exclusive of certain deductions for repairs which we have found were unjustified, the following sums:

Vessel	Principal amount of tender (excluding interest)	Per dead-weight ton
Nebraskan	$744,434.00	$62.74
Dakotan	670,210.00	65.87
Iowan	694,743.00	70.10
Neradan	608,899.00	61.67
Pennsylvanian	565,910.00	55.62
Illinoian	588,752.00	54.41
Kentuckian	432,042.00	43.53
Columbian	153,847.77*	16.21
Mexican	180,830.58*	13.08
Virginian	158,100.53*	12.91

On April 11, 1945, the War Shipping Administration paid plaintiff 75 percent of the principal amounts of the tenders for seven of the vessels as follows:

Vessel	Amount of payment on account	Vessel	Amount of payment on account
Nebraskan	$558,325.50	*Pennsylvanian*	$424,432.50
Dakotan	502,657.50	*Illinoian*	441,564.00
Iowan	521,057.25	*Kentuckian*	324,031.50
Neradan	456,674.25		

On January 18, 1949, the Maritime Commission paid plaintiff 75 percent of the principal amounts of the tenders of just compensation for the remaining three vessels as follows:

Vessel	Amount of payment on account
Columbian	$115,385.83
Mexican	135,622.95
Virginian	118,575.93

The deadweight tonnage, cargo capacity, and the year built, were as follows:

Vessel	Deadweight tonnage	Cargo capacity	Year built
	Tons	*Cubic feet*	
Nebraskan	11, 960	567, 240	1912
Dakotan	10, 175	461, 923	1912
Iowan	10, 175	461, 923	1914
Nevadan	10, 055	575, 360	1912
Pennsylvanian	10, 175	461, 923	1913
Illinoian	10, 820	531, 105	1918
Kentuckian	9, 925	432, 165	1910
Columbian	9, 490	384, 130	1913
Mexican	13, 825	606, 421	1907
Virginian	12, 250	642, 694	1903

The propelling machinery of all the requisitioned ships consisted of reciprocating steam engines and oil-burning boilers of scotch type. All were driven by single screws and were fitted with contra propellers, except the *Mexican* and *Virginian*, both of which had twin screws. The speed in nautical miles per hour of each vessel, the indicated horsepower of its engines, its normal fuel consumption in barrels of fuel oil per day while operating at sea and its "cruising radius," indicating the maximum length of voyage which the vessel could perform without refueling were as follows:

Vessel	Speed (in knots)	Horsepower (indicated)	Daily fuel consumption (in barrels)	Cruising radius (in nautical miles)
Nebraskan	12.2	4, 000	263	10, 560
Dakotan	12.0	4, 000	229	9, 200
Iowan	12.0	4, 000	208	10, 120
Nevadan	11.6	3, 600	238	11, 050
Penns lvanian	12.0	4, 000	212	9, 940
Illinoian	10.8	3, 300	167	15, 090
Kentuckian	11.9	3, 000	200	16, 390
Columbian	12.1	3, 400	198	19, 180
Mexican	11.6	4, 600	303	10, 950
Virginian	12.1	5, 200	306	13, 500

All the requisitioned ships had three complete cargo decks, except the *Virginian*, which had four decks, and the *Illinoian*, which had two decks. All the ships also had a platform deck or partial deck ("orlop" deck) in No. 1 lower hold, except the *Illinoian*, *Kentuckian*, and *Virginian*. The cargo hatches of all the requisitioned ships were each equipped with at least two steam winches and two booms (constituting one "set" of cargo gear), and some ships had

two "sets" of cargo gear at some hatches. Most of the ships were also equipped with special gear for heavy lifts and special lockers for carriage of valuable cargo.

All of the requisitioned ships had been well maintained and were in seaworthy condition at the time they were requisitioned.

We have recently rendered a decision for plaintiff in a suit for just compensation for the use of one of its vessels, *American-Hawaiian Steamship Company* v. *United States*, 129 C. Cls. 365. The legal arguments presented in the former case and the present cases are essentially the same. The proof in the former and present cases is basically the same. Therefore, much of what we said in that case is equally applicable to these cases.

The general principles appropriate to the ascertainment of just compensation were stated in *American-Hawaiian Steamship Co.* v. *United States*, *supra*, at page 369, as follows:

> * * * Just compensation has been defined as "the sum which, considering all the circumstances—uncertainties of the war and the rest—* * * would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123–124; *Olson* v. *United States*, 292 U. S. 246, 257. This is but another way of saying that fair market value, where there is a free market, is the usual standard of just compensation. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123; *Olson* v. *United States*, *supra*, p. 255; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326; *Boom Company* v. *Patterson*, 98 U. S. 403, 407. Where, for any reason, property has no market, resort must be had to other data to ascertain its value, although this "involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." *United States* v. *Miller*, 317 U. S. 369, 374. The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a "reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases*, 230 U. S. 352, 434." *Standard Oil Co., of New Jersey* v. *Southern Pacific Co.*, 268 U. S. 146, 156.

During the years 1942 to 1945, inclusive, when eight of the vessels in suit were requisitioned, there were no sales in the United States of large, dry-cargo freighters comparable to

plaintiff's vessels, because of the general requisition of the use of ocean-going freighters by the War Shipping Administration in April 1942, the Administration's General Order No. 27 of April 23, 1942, prohibiting the sale or charter of such vessels unless approved by the Administrator, and other measures initiated by the War Shipping Administration under the Ship Warrants Act (55 Stat. 591, as amended, 50 U. S. C. App. 1281 et seq.; repealed July 25, 1947, 61 Stat. 449).

Since there was no free market and no sales at or about the time of the takings of these eight vessels, other relevant data must be viewed and weighed in determining just compensation. *United States* v. *Miller*, *supra*.

The plaintiff contends values of the first eight vessels at the time of their respective takings were the following dollar amounts per deadweight ton:

Nebraskan	$135	*Pennsylvanian*	$130
Dakotan	135	*Illinoian*	120
Iowan	135	*Kentuckian*	130
Nevadan	130	*Columbian*	120

These values were based on the opinions of plaintiff's expert witnesses as to the value of the vessels in April 1941.

The defendant contends that the values of these eight vessels per deadweight ton were:

Nebraskan	$52.30	*Pennsylvanian*	$39.88
Dakotan	54.18	*Illinoian*	42.03
Iowan	55.80	*Kentuckian*	32.42
Nevadan	58.67	*Columbian*	33.17

These values were based on the opinions of defendant's expert witnesses. We do not believe that either of these sets of valuations approximate the values of plaintiff's eight vessels at the time they were taken.

In 1939, before the beginning of the Second World War, there was a surplus of dry-cargo freighters throughout the world. This excess tonnage had the obvious effect of depressing the market values of such vessels. However, as a result of war casualties and restrictions and other factors a shortage of vessels developed so that by the latter part of 1940 it was difficult to obtain shipping space. Early in 1941, ships carried capacity cargoes both outward and homeward.

Until the middle of 1942 losses of cargo vessels exceeded new construction, but thereafter new construction exceeded the losses, and by the middle of 1943 the size of the fleet had been restored to the 1939 level. After the middle of 1943, new cargo ships constructed represented substantial net increases to the world fleet. However, there was no surplus of American freighters during the period of hostilities. By the end of 1944, 74 percent of the War Shipping Administration fleet was being used for Army and Navy cargo; space for the carriage of nonmilitary cargo was allotted by the Division of Allocations of the War Shipping Administration.

In 1939, the earnings of United States-flag freighters in the foreign trades averaged between $10 and $15 per deadweight ton per annum. By the early part of 1941, the peak period of vessel earnings and market values, the plaintiff's vessels and vessels comparable thereto were sometimes earning as high as $84 per deadweight ton per annum, with profits sometimes over $60 per deadweight ton, exclusive of overhead, depreciation, and taxes.

An important factor in determining the value of these eight vessels, of course, is the actual sales price of comparable vessels in the last free market. *Smith-Douglas* v. *United States*, 126 C. Cls. 758, *cert. den.* 348 U. S. 815. Indeed, this is a good starting point for the making of an intelligent estimate of what these ships would have brought on the dates of requisition, had there been a free market at that time, although this was, in the case at bar, a highly inflated price. In August 1939 one Hog Island freighter, which is a dry-cargo steamer with a deadweight capacity of about 8,000 tons and an average speed of 10 knots sold at a price of $11.62 per deadweight ton. In January and February 1940, three of these vessels were sold at an average price of $42.50 per deadweight ton. In January 1940, plaintiff sold five of its vessels, which were comparable to the eight vessels involved here, at the following prices per deadweight ton: the *Canadian* at $42.83, the *Delawarean* at $46.97, the *Louisianan* at $46.82, the *Indianan* at $45.02, and the *Tennessean* at $41.04. The average price received by plaintiff was $44.53 per deadweight ton, which was a little more than $2 per deadweight ton more than what Hog Island vessels sold for

during the same month. From May through December 1940, seven Hog Island freighters were sold at an average price of $59.02 per deadweight ton per ship.

The only private sales of large freighters in the United States market in 1941 were sales of the Hog Island type. A summary of such sales which occurred between January 17 and April 29, 1941, is set forth below. The term "sound condition price," as distinguished from market price, includes the purchase price, any commission or agency fee paid by the buyer, and the cost of any repairs or reconditioning incurred by the buyer to put the vessel in sound operating condition.

Date of sale	Ship (new name and former name)	Sound condition price	Price per deadweight ton
Jan. 17	*Mary Luckenbach* ex-*Black Falcon*	$500,000	$62.50
Jan. 17	*Nina Luckenbach* ex-*Gulf*	500,000	62.50
Jan. 29	*Particia Skakel* ex-*Exchester*	575,000	71.88
Apr. 7	*Melvin H. Baker* ex-*Willmoto*	709,620	88.70
Apr. 29	*Alcoa Banner* ex-*Sundance*	666,250	83.28
Apr. 29	*Alcoa Cutter* ex-*Sucarappa*	691,875	86.48

No repairs were required to place any of these vessels in a sound operating condition with the exception of the *Melvin H. Baker*, on which the buyer expended $54,620 for repairs.

So that, prices rose in a year and a half after the outbreak of the war in Europe from $11.62 a deadweight ton to an average of $86.15.

Although the April 1941 value was highly inflated, still, if plaintiff had been able to sell his vessels for this price at the date of requisition, it would be difficult to refute the statement that it would be unjust to pay it less. But could it have done so, had it been permitted to sell them to anyone other than the United States? Between April 1941 and the dates of requisition, there occurred a series of historic events, which, in our opinion, reduced the values of plaintiffs' vessels below the amounts which plaintiff could have obtained had it sold them in 1941. These events were: the President's Proclamation of May 27, 1941, declaring the existence of an unlimited national emergency; the introduction and passage of the Ship Warrants Act, *supra;* the orders and regulations of the Maritime Commission, the War Ship-

ping Administration and other agencies necessary to the successful prosecution of the war; the entrance of the United States into World War II with the conditions which arose out of the necessity for utilizing the Nation's entire merchant fleet for purposes essential to the conduct of the war; and sinkings and other war damage and other conditions which resulted in more frequent and longer lay-ups for repairs, shortage of fuel, delays by convoy operations; longer and in many cases unprofitable voyages, overstraining of machinery, changes in trade services and routings, congestion and delays in loading and unloading, wartime red tape, and inspection and certification in connection with blockades.

As shown in detail in the findings, by 1943 the tonnage of new ships constructed had exceeded the amount destroyed, and from then on our merchant fleet grew further and further beyond what it was in 1939. On January 1, 1945, the Director of War Mobilization and Reconversion reported to the President and Congress that, as against 1,100 seagoing vessels in 1939, we would have at the end of the war 5,700 vessels, including 2,500 Liberty ships, and 2,500 C-type and Victory ships, in addition to 700 old ships built before the war. These new vessels completely outmoded the old ones for peacetime use, although there was use for all ships, both old and new, during the war and for a year or so thereafter.

On the other hand, before the passage of the Ship Warrants Act, and the regulations of the War Shipping Administration, earnings of nearly all vessels were very high; freight rates had risen from $3.25 a ton to $7.50, and in some cases even more. With such rates a purchaser of one of these vessels could probably have recaptured its costs within three or four years.

However, the restrictions imposed by the Ship Warrants Act and the regulations of the War Shipping Administration, and other war conditions, were actually in effect when the ships were requisitioned and these depressed earnings and values, and, so, we must seek to ascertain the value a willing seller and a willing buyer would have been able to agree upon in the light of these restrictions. The following consolidated table presents the facts with regard to each vessel, so far as they can be shown statistically:

THIS PAGE BOUND VERTICAL IN BOOK

Name of vessel	Date of requisition	Age when requisitioned	Deadweight tons	Cargo capacity (cubic feet)	Speed	Horsepower	Daily fuel consumption (barrels)	Cruising radius	Sales early 1940 per deadweight ton
Nebraskan	Dec. 2, 1942	30	11,960	567,240	12.2	4,000	263	10,560	
Dakotan	Dec. 12, 1942	30	10,175	461,923	12.0	4,000	229	9,200	
Iowan	Dec. 26, 1942	28	10,175	461,923	12.0	4,000	208	10,120	
Nevadan	Jan. 7, 1943	31	10,055	575,360	11.6	3,600	238	11,050	
Pennsylvanian	June 30, 1944	31	10,175	461,923	12.0	4,000	212	9,940	
Kentuckian	June 30, 1944	34	9,925	432,165	11.9	3,000	200	16,390	
Illinoian	June 30, 1944	26	10,820	531,105	10.8	3,300	167	15,090	
Columbian	Jan. 8, 1945	32	9,490	384,139	12.1	3,400	198	19,180	
Hog Island ships			8,000		10.0				Average, $42.50
5 of plaintiff's ships									Average, $44.50

Name of vessel	Date of requisition	Sales late 1940 per deadweight ton	Sales early 1941 per deadweight ton	Sales Oct. 17, 1941 per deadweight ton	Allowance	Allowance per deadweight ton	Plaintiff claims per deadweight ton	Defendant claims per deadweight ton	Tender by War Shipping Administration
Nebraskan	Dec. 2, 1942				$894,727	$74.81	$135.00	$52.30	$72.74
Dakotan	Dec. 12, 1942				761,191	74.81	135.00	54.18	65.87
Iowan	Dec. 26, 1942				778,082	76.47	135.00	55.80	70.10
Nevadan	Jan. 7, 1943				735,859	73.18	130.00	58.67	61.67
Pennsylvanian	June 30, 1944				613,145	60.26	130.00	39.88	55.62
Kentuckian	June 30, 1944				577,635	58.20	130.00	32.42	43.53
Illinoian	June 30, 1944				663,266	61.30	120.00	42.03	54.41
Columbian	Jan. 8, 1945				465,000	49.00	120.00	33.17	16.21
Hog Island ships		$59.02	Average, $78.57	$84.24					
5 of plaintiff's ships									

In addition, witnesses have testified as to the condition, characteristics, and value of each vessel. We have taken into consideration the general characteristics of each of the vessels, their physical condition, age, depreciation, the earnings before requisition, prospective earnings, the sales prices of comparable vessels in the last free market, the supply and demand for vessels, the operating conditions during the war, the uncertainties of the war, and legislative and administrative restrictions, and have concluded that the amounts set forth below represent what a willing buyer would have given a willing seller for eight of plaintiff's vessels at the time they were taken.

Name of vessel	Approximate amount per deadweight ton	Value at time of taking
Nebraskan	$74.81	$894,727
Dakotan	74.81	761,191
Iowan	76.47	778,082
Nevadan	73.18	735,859
Pennsylvanian	60.26	613,145
Kentuckian	58.20	577,635
Illinoian	61.30	663,266
Columbian	49.00	465,000

It will be noted that there are differences in the amount allowed per deadweight ton. This is due to the testimony of the witnesses and other evidence as to the varying characteristics and condition of the several vessels.

We have found a somewhat lower value for the *Columbian* in proportion to the values found for the others. This is partly because when she was taken the end of the war was in sight, and, therefore, the end of her useful life.

The figures we have adopted do not include any sum for enhancement in value due to the causes that necessitated the taking. As shown in the findings, such enhancement, if any, was negligible.

The foregoing does not apply to the *Mexican* and *Virginian* which were taken when there was a free market, on May 14, 1946 and May 23, 1946, respectively. The plaintiff contends that the values of the *Mexican* and *Virginian* when they were taken were $622,125 and $551,250, respectively, which is $45 per deadweight ton for each. The defendant

contends that their values were $268,000 and $252,000, respectively, which is about $19.39 and $20.57 per deadweight ton, respectively.

On March 8, 1946, the Merchant Ship Sales Act of 1946 (60 Stat. 41) was enacted. That statute authorized the Maritime Commission to dispose of war-built merchant vessels to citizens of the United States at a "statutory sales price" which, in the case of dry-cargo vessels, was 50 percent of the prewar domestic cost. The Act also provided that the statutory sales price was to be depreciated at the rate of five percent per annum from the date of construction of the vessel and permitted the Maritime Commission to make a further deduction of three percent per annum for excessive wear and tear by reason of war service. Floor prices equivalent to 31½ percent of the domestic war cost of the Liberty-type vessels and to 35 percent of the domestic war cost of other dry-cargo vessels were established. In addition, the Act provided that citizens of the United States could buy these war-built vessels at the established prices by making a down payment of 25 percent thereof and paying the balance in twenty annual installments, bearing interest at the rate of 3½ percent per annum.

On April 13, 1946, the Maritime Commission issued its General Order No. 60 promulgating rules and regulations for sales under the Merchant Ship Sales Act of 1946. For the standard Liberty cargo vessel, a ship of 10,800 tons deadweight capacity and a speed of 11 knots, the floor price set forth in the order was equivalent to $50.42 per deadweight ton. For the standard Victory cargo vessel, which was a modern vessel of 10,300 deadweight capacity and a speed of 15.3 knots, the floor price established in the order was equivalent to about $81.40 per deadweight ton.

As a result of the size and composition of the post-war merchant fleet and the passage of the Merchant Ship Sales Act, there was virtually no demand by American ship operators for old, dry-cargo vessels, such as the *Mexican* and the *Virginian* when they were requisitioned in May 1946. There was, however, a market in the United States for the sale of such freighters to foreign buyers.

Included among the sales to foreign buyers were thirteen freighters of over 10,000 tons deadweight capacity, and varying in age from 25 years to almost 43 years at the time of the sales. The sales prices ranged from $240,000 to $445,000 per ship. There were also eleven sales of dry-cargo freighters of more than 9,000 tons deadweight capacity and varying in age from about 25 years to more than 29 years on the dates of sale. The sales prices ranged from $150,000 to $400,000 per ship.

When they were requisitioned, the *Mexican* was more than 39 years old and the *Virginian* was nearly 43 years old. Among the sales to foreign buyers, the vessel which was nearest in age and size to the *Mexican* and *Virginian* was the *President Johnson*, a vessel of 15,167 tons deadweight capacity, which was more than 42 years old at the time of sale. This vessel had originally been a combination passenger-cargo ship, but had been converted to a dry-cargo freighter. She was sold in December 1946 at a price of $240,000.

Among the sales in 1946, there was also the *William Luckenback*, which was comparable in age to the *Mexican* and *Virginian*. She was a dry-cargo freighter of 10,901 tons deadweight capacity and was more than 33 years of age when sold in December 1946. She was sold for a price of $445,000.

In 1946, plaintiff sold five of its dry-cargo freighters to foreign buyers. The *Utahan* was sold in May 1946 at a price of $320,000; the *Kansan* was sold in August 1946 at a price of $350,000; the *Carolinian* was sold in August 1946 at a price of $380,000; the *Arizonian* was sold in October 1946 at a price of $385,000, and the *Georgian* was sold in November 1946 at a price of $360,000.

The prices paid by the foreign buyers in 1946 represented prices for the vessels in their condition at the time of sale without regard to any expenditures required to place them in sound operating condition.

The following table gives the statistics relative to the *Mexican* and the *Virginian* and comparable vessels:

THIS PAGE BOUND VERTICAL IN BOOK

IN RE: SHIPS REQUISITIONED 1946

Name of vessel	Date of sale	Age when requisitioned	Dead-weight tons	Cargo capacity (cubic feet)	Speed	Horse-power	Daily fuel consumption (barrels)	Cruising radius	Allowance	Plaintiff claims (per vessel)	Defendant claims (per vessel)	1946 sales price for comparable vessels	Tender by War Shipping Administration
President Johnson	December 1946	42	15, 167	.....	.....	11, 000	.....	.....	.....	.....	.....	$240, 000	.....
William Luckenback	December 1946	33	10, 901	.....	.....	4, 000	.....	.....	.....	.....	.....	445, 000	.....
Plaintiff's vessels:													
Utahan	May 1946	26	10, 231	.....	.....	2, 800	.....	.....	.....	.....	.....	.....	.....
Kansan	August 1946	28	9, 460	.....	.....	3, 400	.....	.....	.....	.....	.....	320, 000	.....
Carolinian	August 1946	24	10, 380	.....	.....	2, 000	.....	.....	.....	.....	.....	350, 000	.....
Arizonian	October 1946	26	11, 600	.....	.....	2, 000	.....	.....	.....	.....	.....	380, 000	.....
Georgian	November 1946	26	11, 600	.....	.....	2, 000	.....	.....	.....	.....	.....	385, 000	.....
Mexican	.....	39	13, 825	606, 421	11. 6	4, 000	303	10, 950	$320, 000	$622, 125	$268, 000	360, 000	.....
Virginian	.....	43	12, 250	642, 694	12. 1	5, 200	306	13, 500	300, 000	551, 250	252, 000	.....	$180, 830. 58
													158, 100. 53

Taking into consideration the general characteristics of the *Mexican* and the *Virginian*, their age, and the sales prices of comparable vessels, we conclude that a willing buyer would have given a willing seller $320,000 for the *Mexican*, and $300,000 for the *Virginian*.

Plaintiff is entitled to recover the sum of $2,510,577.79, representing the balance of just compensation for the taking of each of plaintiff's ten vessels, in the following amounts, which are the amounts we have found to be just compensation for the taking of each vessel, less the amounts already paid:

Nebraskan	$336,401.50
Dakotan	258,533.50
Iowan	257,024.75
Nevadan	279,184.75
Pennsylvanian	188,712.50
Kentuckian	253,603.50
Illinoian	221,702.00
Columbian	349,614.17
Mexican	184,377.05
Virginian	181,424.07;

and as compensation for delay in payment, computed at 4 per cent per annum on the amounts set out in findings 48 and 50 from the date of taking of each of the vessels, the *Nebraskan* on December 2, 1942, the *Dakotan* on December 12, 1942, the *Iowan* on December 26, 1942, the *Nevadan* on January 17, 1943, the *Pennsylvanian* on June 30, 1944, the *Illinoian* on June 30, 1944, the *Kentuckian* on June 30, 1944, the *Columbian* on January 8, 1945, the *Mexican* on May 14, 1946, the *Virginian* on May 23, 1946, to the date of payment of 75 per cent of the amount determined by the War Shipping Administration as just compensation, as set out in findings 4 and 5, plus interest on the amounts set out immediately above from the date of the payments made as set out in findings 4 and 5 to the date of the payment of the judgment herein.

Entry of judgment is suspended pending the filing of a stipulation by the parties showing the amount due plaintiff computed in accordance with this opinion.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

G. ORDER EXTENDING TIME

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, PETITIONER

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY AS OWNER OF THE AMERICAN STEAMSHIP *Hawaiian*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 30th, 1955.

s/ HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of July 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

Office - Supreme Court,
FILED
SEP 26 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 361.

THE UNITED STATES OF AMERICA,
Cross-Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *HAWAIIAN*,
Cross-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

CLEMENT C. RINEHART,
Counsel for Cross-Respondent,
120 Broadway,
New York 5, N. Y.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

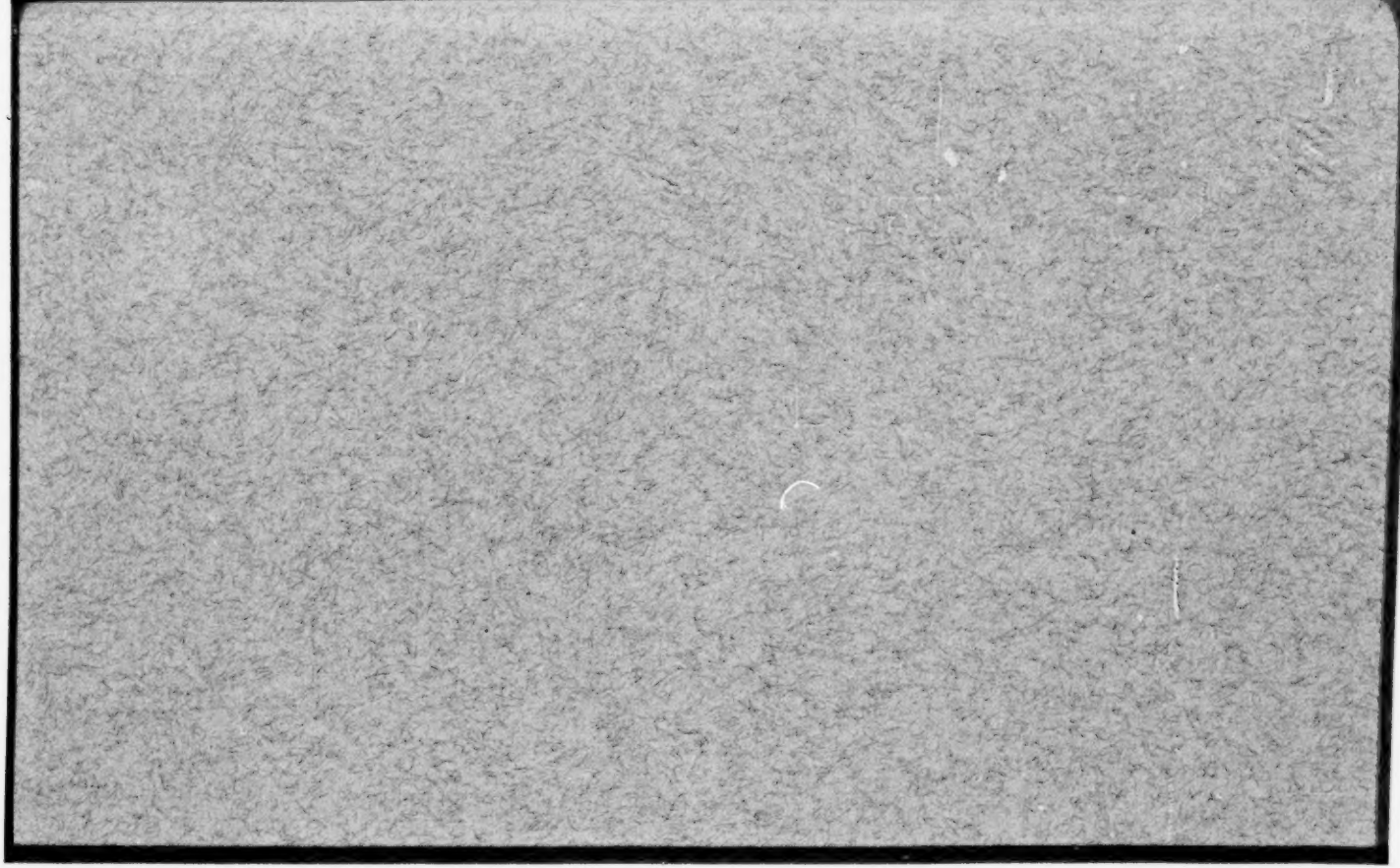

TABLE OF CONTENTS.

	PAGE
PRELIMINARY STATEMENT	1
I. Reply to the Government Contentions Based on the Alleged General "Acceptance" of the Government Rates by the "Shipping Industry"	6
II. Reply to the Government Contention That an Administrative "Award" of Compensation is *Prima Facie* "Just" and May Not Be Set Aside Unless the Property-Owner Makes a "Positive Showing" of "Peculiar Hardship"	8
III. Reply to the Government's Assertion That the $2.50 Rate Awarded by the Court of Claims Was "Patently Unjust to the Public"	11
CONCLUSION	13

Authorities Cited.

	PAGE
Constitution of the United States (Fifth Amendment)	9
Decisions.	
Brooks-Scanlon v. *United States*, 265 U. S. 106	11
Monongahela Nav. Co. v. *United States*, 148 U. S. 312	9
Olson v. *United States*, 292 U. S. 246	11
Smith-Douglass Co., Inc. v. *United States*, 1953, 126 C. Cls. 758	4
United States v. *Commodities Trading Corp.*, 339 U. S. 121	8
United States v. *Felin & Co.*, 334 U. S. 624	8
United States v. *Miller*, 317 U. S. 369	9
United States v. *New River Collieries Co.*, 262 U. S. 341	11
United States v. *Toronto, etc. Nav. Co.*, 338 U. S. 396	11
Vogelstein v. *United States*, 262 U. S. 337	7, 12
Statutes.	
Merchant Marine Act, 1936, 46 U. S. C. 1242, Section 902C	9
Ship Warrants Act of July 14, 1941, 55 Stat. 591	2
Miscellaneous.	
Wigmore on Evidence, 3rd Ed., Sections 29-A, 443, 1904	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 361.

THE UNITED STATES OF AMERICA,
Cross-Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, as Owner of the American Steamship *HAWAIIAN,*
Cross-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Preliminary Statement.

The cross-petition[1] of the United States asks review of a judgment of the Court of Claims awarding cross-respondent, American-Hawaiian Steamship Company, hire at the rate of $2.50 per deadweight ton per month as just compensation for the use of its freight steamer *Hawaiian*

[1] The petition of American-Hawaiian Steamship Company for certiorari was filed on July 29, 1955 and is No. 273, October Term, 1955. For convenience of reference in this brief to the respective parties to the cross-petition, the United States, cross-petitioner, will generally be called the "government" and the American-Hawaiian Steamship Company, cross-respondent, will generally be called the "shipowner".

while under requisition of use on "bareboat basis"[2] by the War Shipping Administration from July 7, 1943 to May 1, 1946. (Findings 1, 32, App.[3] 87, 116; 129 C. Cls. 365 at 373, 374, 400.)

The lack of substance in the propositions of fact and law suggested in the cross-petition will be more apparent when considered in the light of a brief statement of some of the main features of the case.

The basic issues arise out of a program[4] initiated in mid-1941 by the United States Maritime Commission and

---

[2] Requisition on "bareboat basis" means that the government took over the entire possession and operation of the vessel. (See Finding 9, App. 92.) This contrasts with the prior requisition on "time charter basis" under which the shipowner retained possession and operation of the vessel and paid for crew, supplies, repairs and insurance (except war risk insurance). (See also Finding 9, cited above.)

[3] References preceded by "App." are to the portions of the record which are printed in the "Appendix" to shipowner's petition filed in Docket No. 273.

[4] Particulars of the program are described in Findings Nos. 20-28 of the Court of Claims (App. 101-111). Additional particulars are given in the Commissioner's Findings Nos. 24-32, App. 58-73. Among the program's chief features were four rate schedules. Two schedules of maximum time charter rates were issued by the Commission on July 30, 1941 and January 5, 1942, respectively, under the Ship Warrants Act of July 14, 1941. Those were followed by two schedules of requisition rates issued by the War Shipping Administration, the first being in March, 1942, in connection with the general requisition on time charter basis in April, 1942, and the second being in April, 1944, in connection with the general requisitioning on bareboat basis in 1943. In contrast to the time charter rate of $7.50 per deadweight ton per month (equivalent to $5.61 on "bareboat" basis) which prevailed and was approved by the Commission through July, 1941 (Finding No. 16, App. 98-99), the schedules successively fixed the following rates for a vessel like the *Hawaiian:*

Date of Rate Schedule	Rate Basis	Rate Per Deadweight Ton Per Mo.	Approximate "Bareboat Equivalent"	References To Court Findings
7/30/41	Time Charter	$4.60	$2.71	21(a);16.
1/ 5/42	" "	3.55	1.66	21(c);16.
5/14/42	" "	4.35	2.46	23 ;16.
4/ 7/44	Bareboat	1.28	1.28	2

continued until 1946 by its successor agency, the War Shipping Administration, to force a "roll-back" in ocean transportation rates[5] to 1939 or 1940 levels. The admitted purpose of the program was to enable those agencies to obtain the use of privately-owned ships and ultimately to requisition them at such drastically reduced levels instead of at levels representing current fair and reasonable market values of the use of ships. (App. 125-134; Commissioner's Finding No. 24, App. 58.)

At that time, and until the ships later entered government service, the *Hawaiian* and large American freighters generally were realizing earnings at levels between $5.00 and $6.00 per deadweight ton per month from commercial operations in foreign trade. That earning power was established by actual voyage accounts submitted in evidence covering about 200 voyages of American freighters terminating in 1941 and 1942, and by specific public admissions by officers of the Maritime Commission or the War Shipping Administration. (See Commissioner's Findings Nos. 10-17, App. 47-54; see also p. 7 of the petition in No. 273.) Moreover, such earnings were not derived from war traffic, as the cross-petition wrongfully implies (Finding No. 8, App.

---

[5] To avoid confusion, it is important to distinguish between: (a) the common carrier rates (i. e., "berth" or tariff rates) or contract rates charged to shippers for the transportation of goods by a ship; and (b) the rate of earnings which a ship realizes from such carriage.

The value of the use of a ship is determined by the level of her potential earnings whether she is operated by her owner in berth service for his own account or whether her use is transferred to other operators by time charter or by bareboat charter. (Finding No. 9, App. 92-93.)

Increases in the use value of ships after 1939, including increases in time charter rates and bareboat rates, resulted from increases in the volume and value of traffic carried. (Findings Nos. 7 and 8, App. 90-1.) The tariff rates charged to shippers by American freight carriers were not at any time excessive. (Finding No. 7, App. 91.)

91), nor were they "enhanced" by any defense or other needs of the United States. (Finding No. 32, App. 116; see also *Smith-Douglass Co., Inc.* v. *United States,* 1943, 126 C. Cls. 758.) On the contrary, the prevailing levels of American freighter earnings were the result of carriage of goods at fair and reasonable common carrier rates filed with the Maritime Commission, or at charter rates approved by that Commission. (Findings Nos. 7, 8, 16, App. 90-2, 98-9.)

Except for the attempted "roll back" of rates, conditions favored the continuance of such levels of earnings throughout the requisition period if the vessels had remained free of requisition. (Commissioner's Finding No. 21, App. 56-7; Finding No. 17, App. 99.) In fact, the War Shipping Administration itself realized earnings in excess of $5.00 per deadweight ton per month during the requisition period. (See Commissioner's Finding No. 19, App. 55-6.) When requisitions terminated, the shipowner itself again earned comparable levels of profit. (See Commissioner's Finding No. 20, App. 56.)

Thus, the only substantial questions presented to this Court result from the failure of the Court of Claims to adopt the $5.00 to $6.00 level of earning power as the measure of just compensation and from its adoption, instead, of the rate of $2.50 because of the assumed effect which the schedules of "rolled-back" rates would have had on the earning power of the *Hawaiian* if she had remained free of requisition.

In short, the Court of Claims gave effect to the plainly confiscatory price-fixing measures taken by the requisitioning agencies of the government and the main question presented is whether or not the Fifth Amendment protects owners of private property against such confiscation.

No substantial answer to the foregoing is contained either in the "Memorandum" filed by the government in No. 273 or in the cross-petition.

Instead, certain erroneous impressions of fact, prejudicial to the shipowner, are sought to be created by misstatements presumably resulting from unfamiliarity with the record. An unfounded and unjustifiable implication is conveyed that the undisputed levels of ship earning power on which the shipowner founds its case were the result of unconscionable charges by American shipowners. Wholly unsupported suggestions appear that such earnings were "war-inflated"[6] profits and were the result of "an unbalanced market in which a seller could exact exorbitant rates from a desperate buyer"[7] and from "the spiraling prices resulting from the distorted free market."[8]

It is then suggested, without any support whatever, that the schedules of "rolled-back" rates were a legitimate exercise of an assumed government "power to impose controls to terminate such distorted markets".[9]

On those false premises the substance of the government's extraordinary contention is that, "for emergency requisitions * * * in the absence of a free market"[10], the compensation offered by a requisitioning agency should be adopted as the measure of just compensation if: (a) similar offers were generally accepted by other owners of like property[11]; or (b) the property-owner fails to overcome an alleged presumption of correctness or fairness

---

[6] Government "Memorandum" in No. 273, at p. 2; Cross-petition at p. 3.

[7] Government "Memorandum" at p. 2.

[8] Cross-petition at p. 29.

[9] Government "Memorandum" at p. 2.

[10] Cross-petition, p. 19.

[11] Cross-petition, Point 2, pp. 19-23.

in the agency offer by proving "peculiar hardship"[12]; or (c) a higher award would be "unjust to the public"[13].

Such contentions are so obviously incompatible with the elementary constitutional principles governing just compensation that no extended reply is necessary. Therefore, this brief will merely indicate a few of the many errors in the cross-petition.

I.

Reply to the Government Contentions Based on the Alleged General "Acceptance" of the Government Rates by the "Shipping Industry."

Aside from a statement of the general importance of the case (p. 19) the government's first "reason for granting the writ" is the proposition that "acceptance" of the government rates by American shipowners was sufficiently wide-spread that such rates became the market rates or at least were thereby shown to be "just".

The government's contention is wholly irreconcilable with the express finding of fact by the Court of Claims (No. 19, App. 100-1), that the government rates "were not market rates nor equivalent to probable fair market rates".

In fact, the extent of the shipping industry's so-called "acceptance" of the requisition rates was clearly both irrelevant and immaterial[14] for the following reasons:

---

[12] Cross-petition, Point 3, pp. 23-29.

[13] Cross-petition, Point 4, pp. 29-31.

[14] The shipowner objected repeatedly to the receipt of such evidence, which included more than 4,500 contracts or other papers relating to transactions between the government and third parties. (See Transcript, pp. 638, 671-4, 678-681, 1543, 1699.) The evidence was wholly irrelevant and immaterial and was also subject to the grounds of objection stated in *Wigmore on Evidence*, Sections 29-A, 443, 1904. It was also grossly unfair because it was and is used as a basis for contending that the industry accepted the offers as "just" although it was a practical impossibility for the shipowner to locate and examine the 75 "accepting" shipowners involved regarding the circumstances and reasons on which their acceptances of the requisition charters were actually based.

(1) The so-called "acceptances" had no probative value whatever as evidence that the requisition rates were equivalent to fair market rates because they were not acceptances by "willing but uncompelled" sellers, but were given under compulsion exerted by the requisitioning agency, as the Court of Claims expressly found. (See Opinion, App. 85; Finding 26, App. 107-8; for more particulars see also Commissioner's Finding No. 30, App. 68-70.)

(2) Even if such "acceptances" had not been coerced, the constitutional rights of the non-accepting minority of the industry to a judicial determination of just compensation could not be foreclosed or impaired because, from one motive or another, the majority accepted the government's offers in preference to litigation, which was the only alternative. A referendum is not a lawful substitute for a judicial decision.

(3) Moreover, quite apart from ambiguity of motivation, the "acceptances" were also valueless as an indication of "industry-wide" opinion because of the incompleteness of the list. The government's exhibit listed only about 390 freighters owned by about 79 companies. (Def. Exs. 8 and 8a.) At the time of general requisition, however, the American freighter fleet consisted of about 700 large freighters owned by nearly 200 companies. (Plaintiff's Exhibits 43, 50; *Verkstrom,* Tr. 1119-1124; Commissioner's Finding No. 30, App. 68.)

(4) The decision in *Vogelstein* v. *United States,* 262 U. S. 337, 339, on which the government chiefly relies, has no possible application. In the *Vogelstein* case, the entire copper-producing industry, including Vogelstein, with government concurrence and *by common agreement,* fixed the price to be paid for copper in transactions in the open

market, and the court found that such price had "uniformly prevailed during the period in question". That price, therefore, was the actual market price. Accordingly, the Court held that the plaintiff could not recover more merely because plaintiff's copper which was later requisitioned, had originally been bought by plaintiff at a cost exceeding the market price at the time of requisition.

In the instant case there was no common agreement whatever by members of the industry among themselves on the establishment of market rates or any other action equivalent thereto. Each shipowner decided for himself alone whether or not in his particular circumstances, acceptance of the government offer of compensation was preferable to litigation.

II.

Reply to the Government Contention That an Administrative "Award" of Compensation is *Prima Facie* "Just" and May Not Be Set Aside Unless the Property-Owner Makes a "Positive Showing" of "Peculiar Hardship".

The foregoing is the substance of the government's third "reason for granting the writ" (pp. 23-29).

The government's point begins with an attempted false analogy between the rates of compensation offered by the ship requisitioning agencies and the O. P. A. ceiling prices which this Court applied in determining just compensation in *United States* v. *Felin & Co.*, 334 U. S. 624 and in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121. The falsity of that analogy was demonstrated at pp. 20-24 of the shipowner's petition in No. 273. That demonstration is not challenged by anything in the cross-petition or in the government's "Memorandum" in No. 273.

1. The offers of compensation made to shipowners were pursuant to Section 902C of the Merchant Marine Act, 1936 (46 U. S. C. 1242, printed in full at pp. 120-1 of the Appendix to the petition in No. 273), which specifically and fully protected the rights of shipowners who did not accept the Commission's offers. The statute required 75% of the rate of hire offered to be paid "on account of just compensation" to a non-accepting shipowner and further provided that, "such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use."

The administrative offers of just compensation to the owners of requisitioned ships were, therefore, *ex parte* acts which had no higher evidentiary standing than any other offer. They were not in any sense "awards" or "orders" of an administrative agency acting in a quasi-judicial capacity or subject to the requirements of the "due process" clause of the Fifth Amendment.

Obviously such offers could have no constitutionally valid effect as even *prima facie* determinations of just compensation because the determination of just compensation is a judicial function. *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312.

2. Other important considerations also establish the untenability of the government's proposition that an administrative offer should govern unless the property-owner makes a "positive showing" that the offer "does not constitute just compensation".

Such a proposition would inevitably result in compensation far below the "full and perfect equivalent in money of the property taken" (*United States* v. *Miller,* 317 U. S. 369, 373).

The Constitution entitles a property-owner to have that "equivalent" determined by a court upon the basis of competent and relevant evidence of facts probative of either the fair market value of the property, when there is a market, or the probable fair market value if no actual market exists at the time of taking.

Under the suggested government standard, however, the bare administrative offer would be substituted for probative evidence of the actual or probable fair market value and would govern the determination unless the property-owner proves "peculiar hardship".

The standards proposed for determining "peculiar hardship" are not expressly stated but it is implied that the property-owner should be required to accept any offer which produces a "fair" or "adequate" return for the use of his property.

Obviously those proposals are directly opposed to the fundamental purpose of the Fifth Amendment to protect property-owners against abuse of power by government officers.

A property-owner may not lawfully be compelled to accept less than actual or probable fair market value merely because a requisitioning agency may consider a lesser amount is "adequate" or even generous. This would merely be a confiscation of the difference between the price the property-owner could get for his property in a fair market and the price fixed by the agency.

No one would suggest that the government would be entitled to take, *free of charge*, the use of part of a privately-owned building if it appeared that the owner would still be making a "generous return" from rents received from the remainder of the building. It is just as indefensible, however, to suggest that the government has a right to take the use of the entire building at a rate less

than the fair market rate. In both cases there would obviously be a confiscation of part of the owners' property rights.

3. Moreover, application of the doctrine of "peculiar hardship" would inevitably produce unjust discrimination and chaos. Objective standards for determining the value of a given piece of property would be supplanted by consideration of the circumstances of the owner of the property. For instance, an amount constituting a fair return on the investment of one owner in his vessel might be unfair to an owner who had paid more for another identical vessel not capable of rendering any more valuable service. A doctrine leading to such consequences would be quite irreconcilable with this Court's repeated decisions that acquisition cost, book value, or sentimental or other value of property peculiar to the owner, is irrelevant in determination of just compensation. *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Brooks-Scanlon* v. *United States*, 265 U. S. 106; *Olson* v. *United States*, 292 U. S. 246; *United States* v. *Toronto, etc. Nav. Co.*, 338 U. S. 396.

III.

Reply to the Government's Assertion that the $2.50 Rate Awarded by the Court of Claims Was "Patently Unjust to the Public."

The Government's third "reason for granting the writ," (Cross-petition, pp. 29-31), is a contention of fact—i.e. that compensation at the rate of $2.50 allowed by the Court of Claims would be "excessive" and, therefore, "unjust to the public."

The foregoing contention is subject to many answers.

1. Certiorari is not granted by this Court merely to review a finding of fact made by a lower court.

2. The government's contention is also irrelevant to any issue in this case. Just compensation turns on the determination of an objective fact—the actual or probable fair market value of the property taken at the time of taking. Because the government has no duty to indemnify the property owner against any loss resulting from application of that objective standard, (*Vogelstein* v. *United States,* 262 U. S. 337), it necessarily follows that the government has no right to deny or limit any resulting profit. Therefore, the degree of the shipowner's profit or loss, whether great or small, was not an issue in this case and government's contention of "excessive" profit is clearly irrelevant.

3. No possible "injustice to the public" can ever result from the payment of a *fair* market price for private property taken for public use. In any event, no matter what the profit to the property-owner may be, the public is protected against excess wartime profits by taxation on principles applicable uniformly to all property-owners. Gross injustice and discrimination would surely result if each requisitioning agency of the government were permitted to improvise and impose its own ideas of "adequate" compensation for wartime requisitions.

4. Instead of being "excessive", the rate of $2.50 actually was in accordance with the government's own "roll-back" program, as the petition in No. 273 shows (pp. 11-12). That rate was merely the equivalent of the *Hawaiian's* earning power under the requisition time charter rate of $4.35. Therefore, it seems absurd for the government to characterize as "unjust to the public", a rate of earnings derived from its own determination of just compensation. That is especially so because the gov-

ernment itself, immediately before initiating its "roll-back" program had approved a time charter rate of $7.50 which produced earnings of $5.61 (Finding No. 16, App. 98).

5. The rate of $1.25 proposed by the government was manifestly unfair to shipowners as a class. No other American industry was subjected to similar treatment. When the rate was announced, the War Shipping Administrator stated to Congress (Finding No. 28, App. 109-110) that it represented a level "below actual earnings of 1940 and not greatly in excess of earnings of 1939[15] • • • and about ⅓rd of the actual earnings of 1941 [and] less than the average bareboat rates charged by the Maritime Commission in 1940 and 1941" (Finding No. 28, App. 109-110).

In the same statement (Pl. Ex. 51 at p. 4), it was admitted that the earnings of Class I railroads had "increased approximately 1800 percent over 1939" and that the profits of manufacturing and mining industries had "increased in 1943 to 400 per cent of 1939 levels, before taxes."

Conclusion.

The Cross-petition should be denied,

Respectfully submitted,

CLEMENT C. RINEHART,
Counsel for Cross-Respondent,
120 Broadway,
New York 5, N. Y.

New York, N. Y.
September 23, 1955.

---

[15] The rate of $1.25 was less than this shipowner's actual average earnings of $1.27 from domestic operations in intercoastal trade on voyages terminating in the last quarter of 1939. (Finding No. 10, App. 93.)